No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

ALFREDA DILLARD, *et al.*,
Petitioners,

v.

JOE FRANK HARRIS AND
GEORGIA DEPARTMENT OF HUMAN RESOURCES,
Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Section 207(o)(2)(A) of the Fair Labor Standards Act, as amended, defines the limited circumstances under which a public employer is permitted to deviate from the basic FLSA rule that employers must pay employees time and a half for required overtime work. Under § 207(o)(2)(A), a public employer may provide compensatory time in lieu of overtime pay "only pursuant to"

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

Section 207(o)(2) goes on to provide:

> In the case of employees described in [§ 207(o)(2)(A)(ii)] hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o)(2).]

The question presented here (upon which there is a conflict among the courts of appeals) is whether Federal rights granted to public employees by § 207(o)(2)(A)(i) are altered by state laws or policies against public-sector collective bargaining agreements so that a public employer may—whenever there are such state laws or policies—refuse to work out a compensatory time agreement or understanding with a representative designated by its employees and then, nonetheless, provide compensatory time in lieu of overtime pay?

PARTIES

Plaintiffs-appellees in the proceeding before the Court of Appeals were—and petitioners in this Court are—Alfreda Dillard, Jim DuVal, Ida Lee, Betty Hogan, Annie Miller, Jacqueline Parham, Doris Cain, Mae Criswell, Ernest Nicholson and Dorothy White for and on behalf of themselves and others similarly situated.

Defendants-appellants in the proceeding before the Court of Appeals were Joe Frank Harris and Georgia Department of Human Resources.

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PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Alfreda Dillard, *et al.*, the plaintiffs in the District Court and the appellees in the Court of Appeals, hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Alfreda Dillard, et al. v. Joe Frank Harris, et al.*, 11th Cir. Nos. 88-8245 & 88-8439 (September 29, 1989).

OPINIONS BELOW

The Court of Appeals' opinion is reported at 885 F.2d 1549 (11th Cir. 1989) and is reproduced as Appendix A (pp. 1a-16a) of the separately bound Appendix to this *certiorari* petition (hereinafter "Pet. App.").

The District Court's opinion and order granting plaintiffs an injunction and a partial summary judgment is reported at 685 F.Supp. 565 (N.D. Ga. 1988) and is reproduced as Appendix B (Pet. App. 17a-25a). The District Court's opinion and order denying defendants' motion for reconsideration and deciding certain related issues is unpublished and is reproduced as Appendix C (Pet. App. 26a-32a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 29, 1989. A timely petition for rehearing was denied by the Court of Appeals on April 18, 1990. A copy of the order denying the petition for rehearing is reproduced as Appendix D (Pet. App. 33a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 207(o)(1) & (2) of the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. §§ 207(o)(1) & (2), are reproduced as Appendix E (Pet. App. 34a-35a).

The Secretary of Labor's regulations, set out at 29 C.F.R. § 553.23, are reproduced as Appendix F (Pet. App. 36a-38a). Relevant excerpts from the Secretary of Labor's preamble to these regulations, as set out at 52 Fed. Reg. 2014-15 (January 16, 1987), are reproduced as Appendix G (Pet. App. 39a-41a).

STATEMENT OF THE CASE

1. The Fair Labor Standards Act, as amended, establishes a general rule that employers must pay their employees one and a half times the employee's normal pay for overtime work. *See* 29 U.S.C. § 207(a). FLSA § 207(o), added to the Act in 1985, however, establishes a limited exception to this general rule with respect to *public employers*: such employers may, under certain

stated circumstances, provide "compensatory time"—*viz.*, paid time off—in lieu of the overtime pay that the Act normally requires.

In the regard most pertinent here, § 207(o)(2)(A)(i) states that compensatory time may be provided in lieu of the normally required overtime pay when authorized by the "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . . ." The statute also specifies that § 207(o)(2)(A)(i) is the *only* way in which a public employer may utilize compensatory time for those employees who are "covered by" that clause. 29 U.S.C. § 207(o)(2).

2. Petitioners—employees of hospitals operated by respondent Georgia Department of Human Resources ("the Department")—designated the Georgia State Employees Association ("the Association") to represent them for the purpose of working out an agreement or understanding with their employer concerning compensatory time. The Department refused even to discuss any such agreement with the Association. Instead, the Department unilaterally required its employees—including petitioners—to accept compensatory time off in lieu of overtime pay.

Petitioners instituted this suit in the United States District Court for the Northern District of Georgia on April 15, 1986, after the Department—despite protests by petitioners—made clear that it would adhere to its position of refusing either to discuss compensatory time arrangements with the Association or to pay overtime compensation to petitioners. Petitioners' Complaint challenged the legality of the Department's requirement that petitioners accept compensatory time off in lieu of overtime pay despite their designation of a representative and despite the absence of any agreement with that representative.

Respondents defended the Department's policy on the basis that Georgia, as a matter of state law, had chosen

not to permit public agencies to enter collective bargaining agreements with public employee labor organizations; therefore, according to respondents, the Department was privileged to utilize compensatory time off in lieu of overtime pay on a unilateral basis regardless of whether its employees designated a representative for purposes of reaching an agreement or understanding on compensatory time.

3. In an opinion dated September 30, 1987, District Judge Richard C. Freeman rejected respondents' interpretation of the statute and granted petitioners partial summary judgment. Pet. App. 17a-25a. The District Court held that once public employees have designated a representative for purposes of reaching an "agreement or understanding concerning comp time," a public employer may only utilize compensatory time off in lieu of overtime pay pursuant to some form of agreement or understanding reached with the designated representative. Pet. App. 22a.

In reaching this conclusion the District Court followed the regulations that the Department of Labor issued to implement FLSA § 207(o)(2)(A). Pet. App. 22a (citing 29 C.F.R. § 553.23). The District Court, found that these regulations "clearly foreclose[d] [respondents'] argument":

> The [Department of Labor's] regulations provide that where the employees have selected a representative, an agreement is required between the employer and the employees' representative as a condition for the use of comp time in lieu of overtime payment in cash. 29 C.F.R. § 553.23(a)(1). "[T]he representative need not be a formal or recognized bargaining agent *as long as the representative is designated by the employees.*" 29 C.F.R. § 553.23(b)(1). [Pet. App. 22a (emphasis by the District Court).]

In a second opinion, dated March 30, 1988, the District Court reaffirmed its earlier ruling, rejecting respondents' motion for reconsideration. In explaining its holding, the

District Court made clear that, although a public employer under the FLSA remains free to refuse to negotiate any agreement or understanding on overtime compensation with a representative designated by its employees, the consequence of such a refusal is that the public employer—like a comparable private employer—must pay overtime. Pet. App. 28a.

4. On appeal, the Eleventh Circuit—in a decision resting on two alternative theories—reversed the District Court.

First, the Court of Appeals recognized that a conflict between the Fourth and Tenth Circuits existed regarding the proper construction of FLSA § 207(o)(2)(A) and stated its agreement with the Fourth Circuit position. *See* Pet. App. 2a (citing *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989) and *Local 2203 v. West Adams County Fire Dist*, 877 F.2d 814 (10th Cir. 1989)). In the Eleventh Circuit's view—which the court below attributed to the Fourth Circuit as well—employees may only designate representatives if state law permits public-sector collective bargaining agreements. Pet. App. 2a. Having taken that view, the Eleventh Circuit "refuse[d] to follow the Tenth Circuit case," which had adopted substantially the same view of § 207(o)(2)(A) as the District Court in this case. Pet. App. 2a.

Second, the Court of Appeals also endorsed "an alternative approach" to FLSA § 207(o)(2)(A) which—although quite different from the Fourth Circuit's approach in *Abbott*—the Eleventh Circuit viewed as "[e]qually satisfactory." Pet. App. 7a. According to the Eleventh Circuit, under the clear statutory language of § 207(o)(2)(A), an employee's designation of a representative has no legal effect until the public employer reaches a § 207(o)(2)(A)(i) agreement with that representative. Thus, regardless of the employee's designation of a representative, the employer remains free to require compensatory time in lieu of overtime under § 207(o)(2)(A)(ii)

unless the employer chooses to enter a contrary agreement with such representative. Pet. App. 11a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CIRCUIT CONFLICT REGARDING THE PROPER APPLICATION OF THE FLSA'S OVERTIME PROVISIONS TO PUBLIC EMPLOYERS AND PUBLIC EMPLOYEES

The Fair Labor Standards Act originally applied only to private-sector employers and employees. Beginning in 1966, Congress has expanded the coverage of the FLSA's protective provisions—including its overtime compensation provisions—to include state and local government employees such as petitioners.[1]

Congress' assertion of Commerce Clause power to set minimum labor standards for the state and local government sector has raised a contentious federalism dispute. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding constitutionality of 1966 expansion of FLSA coverage to state and local governments); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz* and holding expansions of FLSA coverage to state and local governments to be, in large part, unconstitutional); *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 328 (1985) (overruling *Usery* and upholding constitutionality of FLSA coverage of state and local governments).

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[1] The 1966 amendments applied the FLSA to state and local schools and hospitals. 80 Stat. 831. In 1974, Congress amended the FLSA again, bringing virtually all state and local government employees within the general coverage of the FLSA and (subject to limited exceptions not relevant here) within the specific coverage of the Act's overtime provision, 29 U.S.C. § 207(a). 88 Stat. 58, 60.

With regard to overtime, the FLSA provides that employees covered by the Act, and not otherwise specifically exempted, are entitled to be paid for all overtime hours worked "at a rate not less than one and one-half times [their] regular rate." 29 U.S.C. § 207(a).

At least in part this dispute has stemmed from the concern that Congress could not—or would not—recognize and give adequate consideration to the special attributes of state and local governments and the special character of the public employer-public employee relationship. The 1985 Congress responded to this Court's *Garcia* decision by amending the FLSA insofar as that Act applies to the public sector and did so in a manner designed to *negate this concern*. *See* Fair Labor Standards Amendments Act of 1985, P.L. 99-150, 99 Stat. 790.

Before acting, Congress consulted fully both with public employers and public employees in a process designed to ascertain and accommodate their basic interests and needs. And to further the interest in certainty and stability in the law in this important area of federal-state relations, Congress mandated that the Department of Labor promulgate regulations to assure the proper and orderly implementation of the new provisions. P.L. 99-150, § 6.

Nonetheless, deep disagreements have developed as to the scope of one of the most important provisions of the 1985 Act: *viz.*, the provision requiring public employers who desire to provide compensatory time in lieu of overtime pay to reach an agreement to that effect with representatives designated by their employees. In the five years since that provision—FLSA § 207(o)(2)(A)(i)—became law, four courts of appeals have had occasion to pass on the interplay between this federal law and state laws governing collective bargaining agreements between public employers and public employees. Each court has given § 207(o)(2)(A)(i) a different reading.

The result of these differing approaches is that there are at least four different legal tests for determining when public employees may enjoy the federal overtime rights provided by 29 U.S.C. § 207(o)(2)(A)(i), and when—in those 15 states covered by these circuit courts that do not specifically provide for public sector collective

bargaining—public employees' overtime rights are instead determined by state law.[2]

Put simply, there is a clear and patent conflict among the circuits so that the rights and duties of public employees and public employers with respect to overtime compensation now vary widely depending on the circuit in which the employment occurs. Given the manifest importance—and delicacy—of the resulting question presented here, this *certiorari* petition should be granted.

A. The Background

1. After this Court's *Garcia* decision, many public employers and their organizations argued to Congress that the costs of FLSA coverage would seriously injure their ability to function effectively. In the resulting hearings held by the relevant House and Senate committees, public employees and their representatives made the contrary argument; *viz.*, that compliance with *Garcia* would not be excessively costly and that it was only fair for public employees to enjoy the same minimum labor standards as virtually all private employees.[3]

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[2] According to a 1987 survey of state public-employee relations laws, 24 states have *not* adopted comprehensive collective bargaining statutes governing public-sector employees. *See* BNA, *Daily Labor Report*, No. 59 (March 30, 1987), at page A-2 (summarizing 50-state survey by AFL-CIO Public Employee Department); *see also* BNA, *Government Employee Relations Report*, Vol. 25, No. 1206 (March 23, 1987), at page 407 (same). Thus, the 15 states that do not have public sector collective bargaining statutes and that are within the four circuits that have already dealt with the issue presented in this case (the Fourth, Ninth, Tenth and Eleventh Circuits), represent a substantial majority of those states in which the issue in this case may arise.

[3] For a summary of public employer complaints regarding the costliness of FLSA coverage, see generally *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Fair Labor Standards Amendments Act of 1985*, 99th Cong., 1st Sess. (1985), at 1-2 (testimony by Sen. Nickles explaining efforts to remove public employers from FLSA coverage in response to arguments by public employers and their organiza-

To avoid a legislative deadlock, the public-employer and public-employee groups met and proposed a bill which was the product of intense negotiations between—and extensive compromises by—all the affected parties.[4] This compromise bill was supported by such diverse groups as "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO and the Fraternal Order of Police." 131 Cong. Rec. S14047 (October 24, 1985) (Sen. Nickles); *accord* 131 Cong. Rec. H9238 (October 28, 1985) (Rep. Hawkins). And, with such broad support, the bill was quickly passed by Congress.

2. One of the subjects of compromise concerned the circumstances under which a public employer could provide compensatory time in lieu of overtime pay. As we have noted, the relevant text of § 207(o)(2)(A) provides that a public employer may provide compensatory time in lieu of overtime pay "only pursuant to"

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tions); *id.* at 503-504 (testimony of Secretary of Labor Brock summarizing same history). For the contrary arguments of public employee organizations, see *id.* at 157 (AFL-CIO Public Employee Department); *id.* at 164-185 (International Association of Fire Fighters ("IAFF")); *id.* at 186-201 (Service Employees International Union); *id.* at 375-377 (Professional Fire Fighters of Oklahoma); *id.* at 561-562, 568-569, 574-576 (National Association of Police Organizations); *id.* at 562-567 (Fraternal Order of Police); *id.* 569-571 (National Troopers Coalition); see also *Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, Fair Labor Standards Amendments Act of 1985*, 99th Cong. 1st Sess. (1985), at 85-108 (American Federation of State, County and Municipal Employees); *id.* at 109-128 (IAFF); *id.* at 129-140 (SEIU); *id.* at 151-154 (Amalgamated Transit Union); *id.* at 155-164 (International Union of Police Associations); *id.* at 179-180 (IAFF); *id.* at 236-240 (American Federation of Teachers).

[4] *See, e.g.*, 131 Cong. Rec. S14047 (October 24, 1985) (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (November 7, 1985) (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced the 1985 FLSA amendments).

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), [pursuant to] an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

The section goes on to provide:

> In the case of employees described in [§ 207(o)(2)(A)(ii)] hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o)(2).]

3. As noted above, when it passed the 1985 FLSA amendments, Congress provided for implementing Department of Labor regulations. The Labor Department, therefore, conducted an extensive rulemaking proceeding, and, pursuant to Congress' command—after soliciting and carefully considering the views of all affected parties, including state and local governments and public employees—the Department issued detailed regulations. *See* 52 Fed. Reg. 2012 (1987); 29 C.F.R. §§ 553.20-553.28. Those regulations explained that, under § 207(o), "a condition for the use of [any] compensatory time in lieu of overtime payment in cash" is that there be "an agreement or understanding [regarding compensatory time] reached prior to the performance of work," and that, "where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency." Pet. App. 36a-37a. The regulations also explain that apart from situations involving collective bargaining agreements, "the representative need not be a formal or recognized bargaining agent as long as the

representative is designated by the employees." Pet. App. 37a.

B. The Differing Court of Appeals Readings of FLSA § 207(o)(2)(A)

1. The first court of appeals to interpret FLSA § 207(o)(2)(A) was the Tenth Circuit. *Local 2203 v. West Adams County Fire District*, 877 F.2d 814 (10th Cir. 1989). The West Adams Fire District—asserting the right under Colorado law of a local government employer to refuse to bargain collectively with labor organizations—had refused to enter into a § 207(o)(2)(A)(i) compensatory time agreement or understanding with the reprensentative that had been designated by its employees, but nevertheless insisted on utilizing compensatory time in lieu of overtime pay. The employer argued that state law right precluded its employees from designating a representative under § 207(o)(2)(A)(i), and that the employer was therefore free under § 207(o)(2)(A)(ii) to follow its past practices regarding compensatory time regardless of its employees efforts to designate a representative.[5]

The Tenth Circuit rejected these arguments, concluding that under the FLSA, once employees designate a representative for purposes of reaching a § 207(o)(2)(A)(i) agreement or understanding, a public employer may only provide compensatory time in lieu of overtime pay pursuant to some form of agreement or understanding with the employees' designated representative. 877 F.2d at 820. Section 207(o)(2)(A)(ii)'s permission to provide compensatory time pursuant to individual agreements or past practices, said the Tenth Circuit, applies *only* where the employees in question have *not* designated

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[5] Under Colorado law, local governmental entities generally have a right to refuse to engage in collective bargaining. *See Littleton Education Ass'n v. Arapaho County School District No. 6*, 191 Colo. 411, 553 P.2d 793 (1976).

a representative. *Id.* The Tenth Circuit recognized, of course, that a public employer is under no obligation to reach an agreement or understanding with—or even engage in any discussions with—its employees' representatives; but, said that court, the consequence of the employer's refusal is that the employer must, like other employers, pay overtime for required overtime work. 877 F.2d at 820 n.7.

In reaching its conclusion, the Tenth Circuit principally relied on the Department of Labor's regulations on § 207(o)(2)(A) which state in pertinent part as follows:

> Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency . . . . In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. § 553.23(b)(1) (*quoted at* 877 F.2d at 817).]

This regulation, the Tenth Circuit concluded, makes two points irrefutable:

> *First*, if employees have a representative, an employer may use compensatory time only pursuant to an agreement between the employer and the representative. *Second*, employees are deemed to be represented under section 207(o) if they merely designate a representative; the representative need not be recognized by the employer. [877 F.2d at 818 (emphasis added).]

In evaluating this administrative construction of the statute, the Tenth Circuit undertook two inquiries: (a) is the statutory language ambiguous; and (b) is the administrative construction a reasonable resolution of the ambiguity in light of the statute's language and history. That court answered both inquiries "yes."

As to the "ambiguity of statutory language" issue, the Tenth Circuit stated as follows:

> We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [877 F.2d at 816-817; *see also id.* at 817 n.1.]

Given this ambiguity, the Tenth Circuit followed this Court's instructions in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), recognizing that "the Department's construction of the Section, if reasonable, is controlling even if there is an equally reasonable construction." 877 F.2d at 817.

As to the "reasonableness of the administrative construction" issue the Tenth Circuit looked to the relevant legislative history and found the following:

First, the Tenth Circuit noted that all relevant legislative history materials support the Labor Department's view that § 207(o)(2)(A)(ii) only applies where the employees have *no* representative. *See* 877 F.2d at 819 (*quoting* S. Rep. No. 99-159, 99th Cong., 1st Sess. 10-11 (1985) and H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 20 (1985)).

Second, the Tenth Circuit found that the Labor Department's view on the issue of when employees have a representative is also reasonable. Although there were "variations in the reports of the two houses of Congress", 877 F.2d at 820, the Labor Department's interpretation is based on, and is fully supported by, the House Report, which stated as follows:

> Where employees have *selected* a representative, which *need not be a formal or recognized collective bargaining agent*, as long as it is a representative designated by the employers, the agreement or understanding must be between the representative and the employer. [H.R. Rep. No. 99-331, *supra*, at 20 (*as quoted at* 877 F.2d at 820 (emphasis added by court).]

"[B]ecause of the support of the House report," the Tenth Circuit concluded, the Labor Department "reasonably determined that employees are represented if they have merely designated a represntative whom the employer has failed to recognize." 877 F.2d at 820.

2. The Fourth Circuit issued its decision in *Abbott v. City of Virginia Beach*, 879 F.2d 132 (1989), *cert. denied*, —— U.S. —— (1990), shortly after the Tenth Circuit's *West Adams* decision. In *Abbott*, the Fourth Circuit adopted an interpretation of § 207(o)(2)(A) that simply cannot be reconciled with that of the Tenth Circuit.

In its *Abbott* decision, the Fourth Circuit rejected a challenge by 126 police officers, two labor organizations, and the officers of those organizations to the Virginia Beach Police Department's overtime compensation policies. The police officers had designated the labor organizations and the organizations' officers as their representatives for purposes of working out an agreement or understanding on compensatory time; but the employer had refused to reach any agreement or understanding with those representatives. The employer instead adopted a policy under which each individual police officer could choose whether to receive compensatory time or overtime pay after performing any required overtime work. The employer asserted that, because Virginia law "prohibits [a public employer] from collectively bargaining with representatives of its employees," all cases in Virginia are governed by § 207(o)(2)(A)(ii)—not § 207(o)(2)(A)(i)—so that the employer had authority to adopt the policy at issue. 879 F.2d at 133.

Like the Tenth Circuit, the Fourth Circuit accepted the proposition that, where employees have a representative, a public employer may only provide compensatory time pursuant to an agreement or understanding with the employees' representative. And like the Tenth Circuit, the Fourth Circuit recognized that the relevant

"legislative history is contradictory" on the issue of whether recognition by the public employer of the representative chosen by its employees is necessary before the employees may be deemed to have a representative. 879 F.2d at 135. The Fourth Circuit, however, concluded that the Secretary of Labor's position on the relevant issues is also "confusing." *Id.*

Against this background, the Fourth Circuit's *Abbott* opinion focused on two factors: first, that Virginia state law does not permit public employee collective bargaining, and, second, that the public employer here had allowed each employee required to work overtime an absolute choice between overtime pay and compensatory time (albeit without reaching a § 207(o)(2)(A)(i) agreement with the representative that the affected employees had designated pursuant to that provision).

Regarding the relevance of the state-law status of collective bargaining, the Fourth Circuit quoted language in the preamble of the Labor Department's regulations stating:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a [collective bargaining agreement], memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. . . . The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section [207(o)] shall be determined in accordance with State or local law and practices. [52 Fed. Reg. 2012, 2014-15 (1987) (*as quoted* 879 F.2d at 136).]

On the basis of the foregoing, the Fourth Circuit concluded that § 207(o)(2)(A)(i) should not be construed —where state law prohibits public sector collective bargaining agreements—to require public employers to reach

any agreements or understandings with the employees' representatives as a condition of providing compensatory time. 879 F.2d at 136.[6]

The Fourth Circuit then concluded that, given the state law rule against public sector collective bargaining agreements, Virginia Beach's policy of offering individual employees a choice of overtime pay or compensatory time sufficiently conformed to the underlying policies of § 207 (o)(2)(A), which that court described as "provid[ing] flexibility to state and local government employers and an element of a choice to their employees regarding compensation for statutory overtime hours worked by covered employees." 879 F.2d at 136-137 (*quoting* H.R. Rep. No. 99-331, *supra*).[7]

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[6] As we discuss at pp. 22-26, *infra*, the Fourth Circuit did not cite or discuss other portions of the preamble or the portions of the regulations itself which belie that court's reading of the regulation, nor did the Fourth Circuit explain why the state law status of public-sector collective bargaining agreements is determinative when § 207(o)(2)(A)(i) explicitly permits agreements and understanding far less formal or enforceable than those associated with full collective bargaining. *See*, 29 U.S.C. § 207(o)(2)(A)(i) (allowing a "memorandum of understanding or any other agreement between the public agency and representatives" as alternatives to a collective bargaining agreement); 29 C.F.R. 553.23(b)(1) (allowing a "memorandum of understanding or other type of oral or written agreement" as alternatives to a collective bargaining agreement).

[7] The Fourth Circuit distinguished the Tenth Circuit's *West Adams* decision on the ground that *West Adams* "did not involve a situation where . . . a public employer, who was prohibited by state law from contracting with employee representatives, gave each employee an absolute choice of whether to accept compensatory leave in lieu of money." 879 F.2d at 136.

To the extent that the Fourth Circuit intended to distinguish Virginia law's across-the-board prohibition on public-sector collective bargaining agreements from Colorado law's delegation to local governments of the right to choose between permitting or prohibiting collective bargaining (*see id.* n.4), the Fourth Circuit did not explain why a state decision to prohibit collective bargaining should operate to alter the scope of § 207(o)(2)(A)(i), while a state decision to delegate that decision to a local government should not.

3. At the outset of the decision below, the Eleventh Circuit recognized that there is a clear conflict between the Tenth Circuit's *West Adams* decision and the Fourth Circuit's *Abbott* decision. The Eleventh Circuit then expressly "refuse[d] to follow the Tenth Circuit case" and stated its "agree[ment] with the analysis" of the Fourth Circuit. Pet. App. 2a.

Like the Fourth Circuit, the decision below relied on the language in the preamble to the Labor Department's regulations for the proposition that "a wide variety of State law . . . may be pertinent" in determining whether employees have a representative. Pet. App. 14a (*quoting* 52 Fed. Reg. 2014-15). And like the Fourth Circuit, the court below concluded, with little explanation, that this language should be construed as meaning that a state law prohibtion on public-sector collective bargaining agreements must be understood as precluding *any* type of agreements or understandings between public employers and employee representatives that could be covered by § 207(o)(2)(A)(i). Pet. App. 14a.[8]

Although in these respects the decision below is clearly in conflict with *West Adams* and in agreement with *Abbott*, in other respects the opinion below is in substantial conflict with the *Abbott* decision as well.

First, as the decision below recognized, "in *Abbott* the public employer . . . gave each employee an absolute choice of whether to accept compensatory leave in lieu of money." Pet. App. 15a. Indeed, *Abbott* found this fac-

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[8] As we develop at pages 22-26, *infra*, in reaching this conclusion the Eleventh Circuit failed to recognize the importance of the fact that § 207(o)(2)(A)(i) expressly permits an informal "memorandum of understanding" in the absence of formal collective bargaining agreements. Even in states which prohibit public-sector collective bargaining, informal and non-binding agreements and understandings between public employers and employee representatives are well accepted. *See* pages 22-24, *infra*.

tor dispositive because, in that court's view, § 207(o)(2)(A) demands that there be "an element of choice to [public] employees regarding compensation for statutory overtime hours worked." 879 F.2d at 136. In contrast, the employer here gave employees *no choice at all, having unilaterally adopted a policy of no overtime pay.* The Eleventh Circuit deemed this distinction irrelevant because, in its view, § 207(o)(2)(A) is best construed as "giv[ing] the state agencies the upper hand in [the] decision" of whether overtime will be paid. Pet. App. 15a. In this respect, the Eleventh Circuit's view is in stark conflict with that of the Fourth.

Second, and equally to the point, the Eleventh Circuit declined to rest on the Fourth Circuit's understanding of the basic statutory structure. Instead, the Eleventh Circuit endorsed "an alternative approach" (Pet. App. 2a) that, in the view of the court below, is "[e]qually satisfactory" for resolving disputes over employee rights. Pet. App. 7a. Specifically, the Eleventh Circuit took the view that under the "plain language" of the statute, § 207(o)(2)(A)(i) applies only where an agreement allowing for compensatory time *has already been reached* between an employer and a representative; in all other situations, whether or not the employees have designated a representative, the employer is free to implement compensatory time programs under § 207(o)(2)(A)(ii).

This position is, of course, in direct conflict with both *West Adams* and *Abbott*. Each of those decisions accepted that where employees have a representative, the employer must reach an agreement with that representative or pay overtime; the only point of disagreement was over when employees can be said to have a representative. Indeed, the Eleventh Circuit's position conflicts with *all* of the relevant administrative and legislative materials, which uniformly confirm that whenever an employee has a representative, an agreement or understanding with

that representative is a precondition to the employer's use of compensatory time. *See* 29 C.F.R. § 553.23(b)(1); S. Rep. No. 99-159, *supra*, at 10-11; H.R. Rep. No. 99-331, *supra*, at 20. *See generally West Adams*, *supra*, 877 F.2d at 819.

4. The most recent court of appeals' decision concerning § 207(o)(2)(A)(i) is *Nevada Highway Patrol Association v. Nevada*, 899 F.2d 1549 (9th Cir., 1990), which involved a challenge by state police officers to a state police policy of permitting overtime pay only when adequate funding was made available and otherwise requiring that employees accept compensatory time.

The *Nevada Highway Patrol Association* decision begins, like the *West Adams* and *Abbott* decisions, by accepting that once employees have a representative, § 207(o)(2)(A)(i) permits compensatory time only through an agreement or understanding between the employer and the representative. 899 F.2d at 1552-1553.[9] But the Ninth Circuit then followed *Abbott* and *Dillard* in holding that state law must play a role in determining whether employees may have a representative. 899 F.2d at 1554.

At that critical juncture, however, the Ninth Circuit's decision deviated from *Abbott* and *Dillard*, *sub silentio*, by rejecting the proposition—which those cases accepted—that a state law prohibition of public-sector collective bargaining is sufficient to render § 207(o)(2)(A)(i) inapplicable. Recognizing that § 207(o)(2)(A)(i) does not require full collective bargaining—but instead gives

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[9] The Ninth Circuit mistakenly believed that the court of appeals in the instant case had also accepted this proposition. *See* 899 F.2d at 1552. As we have shown, however, the court below, under its "alternative approach," took the view that under the statute's clear language "the presence or absence of an agreement [and not the presence or absence of a representative] is the factor determining whether employees are 'not covered by subclause (i).'" Pet. App. 10a.

effect to quite informal agreements and understandings—the Ninth Circuit explained, that:

> even if formal collective bargaining were prohibited, we find no Nevada law supporting the proposition that . . . [employees] cannot designate representatives to enter into agreements or understandings with their employers. [899 F.2d at 1554 n.6.]

On this basis—and on the basis that a Nevada state legislative resolution had recognized a particular labor organization's history of "represent[ing] its members for discussion of conditions of employment" with the state (albeit not in the context of collective bargaining)—the court of appeals reversed the district court's dismissal of the complaint and remanded for further proceedings. 899 F.2d at 1554-1555.

Thus, the Ninth Circuit's *Nevada Highway Patrol Association* decision states yet another distinct construction of § 207(o). In conflict with the Eleventh Circuit's treatment of the instant case, the Ninth Circuit recognizes that, even where collective bargaining agreements are prohibited by state law, informal agreements and understandings are sufficient under § 207(o)(2)(A)(i).

* * * *

As the foregoing makes clear, the decisions of the Tenth, Fourth, Eleventh and Ninth Circuits on the meaning of § 207(o)(2)(A) leave the law in total disarray.

In the Tenth Circuit, public employees have a clear federal right to designate representatives to work out agreements or understandings covered by § 207(o)(2)(A)(i). Regardless of state law or practices concerning public employee collective bargaining agreements, if the public employer does not reach some meeting of the minds with these representatives, the public employer must—like other employers—pay overtime. *See* pages 11-14, *supra*.

In the Fourth and Eleventh Circuits, state law concerning public-employee collective bargaining is of significant—although not the same—import. The Fourth Circuit has ruled that state prohibitions on public-sector collective bargaining agreements empower the employer to offer individual employees a choice between overtime or compensatory time after the work is performed, without regard to whether the employees have designated a representative. *See* pages 14-16, *supra*. The Eleventh Circuit has broadly declared that the effect of such state law prohibitions is to entirely remove public employers from the coverage of § 207(o)(2)(A)(i), so that such a public employer may unilaterally deny overtime pay based on past practices. *See* pages 17-18, *supra*. Moreover, the Eleventh Circuit has alternatively declared that, no matter what the state law on public sector collective bargaining agreements may be, employers are empowered to act without regard to designated employee representatives whenever no contrary agreement or understanding with such representatives is in effect. *See* pages 18-19, *supra*.

The Ninth Circuit occupies a middle ground. That court regards state law as significant in determining whether public employees may have a representative under § 207(o)(2)(A)(i), and who that representative may be. But the Ninth Circuit, in contrast to the Fourth and Eleventh Circuits, has made it clear that state *collective bargaining law* is *not* determinative since understandings of far less formality or enforceability than collective bargaining agreements are fully sufficient to qualify as § 207(o)(2)(A)(i) arrangements. *See* pages 19-20, *supra*.

Given this disarray in the lower courts, this Court's guidance is urgently required.

II. THE DECISION BELOW IS NOT ONLY IN CONFLICT WITH OTHER DECISIONS, IT IS IN CONFLICT WITH FLSA § 207(o)(2)(A)(i)

The Eleventh Circuit's decision here is not only inconsistent with the decisions in other circuits regarding the meaning of FLSA § 207(o)(2)(A); as we now show, that decision is also inconsistent with the statutory provision itself. As we have discussed, the Eleventh Circuit rested its judgment on "alternative approach[es]" that, in its view, "reache[d] the same result." Pet. App. 2a. Both of those approaches are fundamentally flawed.

1. The decision below states that petitioners had no right to designate a § 207(o)(2)(A)(i) representative because Georgia state law prohibits public employers from entering collective bargaining agreements—and therefore prohibits public employers from entering into agreements or understandings under § 207(o)(2)(A)(i)—and because Congress intended that such state law prohibitions be determinative in assessing whether the action of public employees in designating a representative is to be given legal effect. The Eleventh Circuit's position in this regard rests on a patent *non sequitor*

a. The relevant statutory and regulatory materials make clear that formal and binding collective bargaining agreements are *not* the only means of complying with § 207(o)(2)(A)(i). In the statute's words, compensatory time may be authorized pursuant to "applicable provisions of a collective bargaining agreement" *or pursuant to a "memorandum of understanding, or any other agreement between the public agency and representatives of such employees."* § 207(o)(2)(A)(i) (emphasis added).

The Labor Department's regulations also emphasize that far less formal or binding arrangements than collective bargaining agreements are fully sufficient for § 207(o)(2)(A)(i) purposes:

> [T]he agreement or understanding . . . [may be] through a memorandum of understanding or other type of oral or written agreement . . . [and, in] the

> absence of a collective bargaining agreement . . . , the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [Pet. App. 44a (29 C.F.R. § 553.23(b)(1)).]

In allowing for these less formal and less binding types of understandings, Congress recognized the diversity of labor relations practices that exist in states in which formal and binding collective bargaining agreements are prohibited by state law. *See, e.g., Nichols v. Bolding*, 277 So.2d 868, 873 (Alabama 1973) (prohibition of public-sector collective bargaining not inconsistent with agency's approval of "memorandum of understanding" which notes that administratively adopted policy was result of agreement with union); *Walker Co. Board of Education v. Walker Co. Educ. Ass'n.*, 431 So.2d 948, 954-955 (Alabama 1983) (same); *Board of Education v. Scottsdale Educ. Ass'n.*, 498 P.2d 578 (Ariz. App. 1972) (prohibition of public-sector collective bargaining not inconsistent with agency's negotiation of model contract for union's members or agency's entering agreement with union that would bind all consenting union members, so long as agreement "contains no terms . . . which could not be included in a standard contract for individual" employees); *State Board v. United Packinghouse Workers*, 175 N.W.2d 110, 113 (Iowa 1970) (prohibition of public-sector collective bargaining not inconsistent with agency's negotiation of terms of public employment with union or with agency's adoption of agreed-upon terms as administrative rule or legislative enactment).

It is thus of particular significance to this case that such public sector labor relations arrangements *have been recognized as legal and proper by the Georgia Attorney General*, who, in a 1975 official position statement for use by Georgia public employers, relied on and quoted from many of the state cases cited above. *See Legal Status of Public Employee Labor Organizations in Georgia*, Op. Ga. Att'y Gen., 75-457 (1975) at 463-465 (reprinted at Pet. App. 51a-53a).

The decision below noted the 1975 Georgia Attorney General's opinion, but asserted that the sort of informal arrangements endorsed therein could not constitute "an 'agreement' or 'memorandum of understanding' between the agency and a representative, as required by 29 U.S.C.A. § 207(o)(2)(A)(i)." Pet. App. 14a.

In this regard, the Eleventh Circuit committed plain error. As the Ninth Circuit recently noted, "even if formal collective bargaining [is] prohibited . . . representatives [can still] enter into agreements or understandings with . . . employers." *Nevada Highway Patrol Association*, *supra*, 899 F.2d at 1554 n.6.

b. The Eleventh Circuit asserted too that the preamble to the Labor Department's regulations supports the proposition that § 207(o)(2)(A)(i) is not intended to apply where state law prohibits public-sector collective bargaining agreements. But the preamble language in question—*viz.*, that "the question of whether employees have a representative for purposes of FLSA [§ 207(o)] shall be determined in accordance with state or local law and practices" (Pet. App. 14a)—does not support that proposition.

During the comment period regarding the Labor Department's *proposed* regulation, numerous public employers challenged and sought to change the proposed language of 29 C.F.R. § 553.23(b)(1), which stated that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." These commentators made the same argument that respondents make in this case—and that the court below accepted—*viz.*, that § 207(o)(2)(A)(i) should have no application where state law fails to recognize public-sector collective bargaining agreements. Pet. App. 40a. In issuing its final regulations, however, the Labor Department refused to alter the language of the proposed rule. As the final regulation states:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA [collective bargaining agreement], *memorandum of understanding, or other agreement* be reached between the public agency and the representative of the employees where the employees have designated a representative. [Pet. App. 40a-41a (52 Fed. Reg. 2014-2015) (emphasis added).]

Indeed, the preamble's next paragraph explicitly states that "collective bargaining is not a necessary condition for establishing" a § 207(o)(2)(A)(i) agreement or understanding. Pet. App. 41a (52 Fed. Reg. 2015).

In light of this, the Eleventh Circuit was wrong in taking the preamble's mention of pertinent "state or local law and practices" as a reference to state law prohibitions on public-sector collective bargaining agreements. As noted, the Labor Department made clear that state prohibitions on public sector collective bargaining do *not* preclude employees from designating a representative under § 207(o)(2)(A)(i). At the same time, in the language cited by the Eleventh Circuit, the Labor Department recognized the commonplace that state laws and practices may nevertheless be relevant to the FLSA's operation. Where state law or practice recognizes some concept of exclusive representation, for example, state law might be highly relevant on the issue of whether a given employee has a representative and who that representative is. *Cf.* Pet. App. 40a-41a (52 Fed. Reg. 2015) (quoting commentator's concern that "an employer could find itself dealing with a different representative for each employee"). *Cf. also Nevada Highway Patrol Association*, *supra*, 899 F.2d at 1554-1555 (interpreting Nevada law as granting exclusive representative status to particular labor organization).

This understanding of the Secretary's preamble was, quite properly, adopted by the District Court, which recognized that:

> The Department's statement that "whether employees have a representative for purposes of [§ 207 (o)(2)(A)] shall be determined in accordance with state or local law and practices" was made in the context of determining whether employees who have a labor representative pursuant to a collective bargaining agreement could designate a different representative, in violation of the bargaining agreement, to represent them on the issue of overtime. [Pet. App. 29a.]

2. As we have already shown, the Eleventh Circuit's "alternative approach" is also without merit. *See* pages 18-19, *supra*. That court stated that "the presence or absence of an agreement [and not the presence or absence of a representative] is the factor determining whether" an employer may rely on § 207(o)(2)(A)(ii) to impose compensatory time programs. Pet. App. 9a-10a. That understanding is in direct conflict with Congress' understanding of the statute, as reflected in both the Senate and House reports. *See* S.Rep. No. 99-159, *supra*, at 10-11; H.R. Rep. No. 99-331, *supra*, at 20. It is also in direct conflict with the clearly expressed understanding of the Secretary of Labor, as reflected in the Secretary's regulations. *See* Pet. App. 37a (29 C.F.R. § 553.23(b)(1)).

CONCLUSION

For the above stated reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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90-120

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALFREDA DILLARD, *et al.*,
Petitioners,

v.

JOE FRANK HARRIS and GEORGIA DEPARTMENT OF HUMAN RESOURCES,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 88-8245 & 88-8439

D.C. Docket No. 1:86-cv-834

ALFREDA DILLARD, *et al.*,
Plaintiffs-Appellees,

versus

JOE FRANK HARRIS and GEORGIA DEPARTMENT OF HUMAN RESOURCES,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(September 29, 1989)

Before RONEY, Chief Judge, HILL, Circuit Judge, and HOWARD*, Chief District Judge.

RONEY, Chief Judge:

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* Honorable Alex T. Howard, Chief U.S. District Judge for the Southern District of Alabama, sitting by designation.

In this action for overtime pay pursuant to the Fair Labor Standards Act, the defendants, Georgia's Governor and Department of Human Resources ("the State"), appeal an injunction and a summary judgment for the plaintiffs, Georgia state hospital employees ("the employees"). We consolidated the two appeals, which involve the same issue: whether the district court misapplied the provisions of the Fair Labor Standards Act governing the awarding of compensatory time to state employees for overtime work in lieu of cash payments. The court ruled that the State must pay its employees for overtime hours in the absence of a negotiated compensatory-time agreement with the employees chosen representative, even though such negotiation is prohib ited by state law. Holding that where state law prohibits agreements with employee representatives, public employers may enter into individual overtime agreements with employees, we reverse.

The issue in this case was recently addressed by the Fourth Circuit in *Abbott v. City of Virginia*, 689 F. Supp. 600 (E.D.Va. 1988), *aff'd*, —— F.2d ——, No. 88-2958 (4th Cir. June 19, 1989). Since we agree with the analysis made in Judge Wilkins opinion in that case, we could simply state that we are following that case and that the distinction in facts between that case and this one do not dictate a different result. In so doing, we refuse to follow the Tenth Circuit case which reached a different result. *International Association of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, No. 88-1691 (10th Cir. June 9, 1989). Because this issue is surfacing in various courts which are reaching divergent results, however, a discussion of an alternative approach that reaches the same result may be appropriate.

Section 7(o)(2)(A) of the Fair Labor Standards Act relates to whether public employees should get compen-

satory time or money for overtime work. It provides that a public agency may provide compensatory time, rather than pay, either pursuant to a collective bargaining agreement between the employer and "representatives of such employees", *or* if employees are not covered by that provision, pursuant to an agreement between the employer and the employee arrived at before performance of the work. In the later case, the regular practice in effect on April 15, 1986 constitutes such an individual agreement for employees hired before that date. 29 U.S.C.A. § 207(o)(2)(A).[1]

The critical fact in this case is that the employees designated a representative, but the employer is prohibited by law from entering into an agreement with that

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[1] Title 29 U.S.C.A. § 207(o) provides in relevant part:

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before performance of the work; and

(B) . . . .

In the case of employees described in clause (A)(ii) hired before April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

representative. The employees take the position that they have a representative and since there is no agreemnt for compensatory time, money for overtime is required. The employer takes the position that the law prohibits an agreement with an employee representative, so that the alternative section applies to make the issue turn on the agreement with the individual employee.

I.

The problem has had an interesting history. As originally enacted, the wage and overtime provisions of the FLSA did not apply at all to employees of state and local governments. Fair Labor Standards Act of 1938, Pub. L. 75-718, § 3(d), 52 Stat. 1060. In 1966, however, Congress amended the FLSA to extend minimum wage and overtime pay coverage to many governmental employees, including those working at state hospitals. Fair Labor Standards Amendments of 1966, Pub. L. 89-601, §§ 102(a) & (b), 80 Stat. 830, 831. Georgia's state hospitals, at which the plaintiffs are employed, then began paying their workers cash for overtime work, as required by the FLSA. In 1968, the Supreme Court held that the 1966 amendments were constitutional. *See Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

In 1974, amendments to the FLSA extended coverage to virtually all state employees. Fair Labor Standards Amendments of 1974, Pub. L. 93-259, §§ 6(a)(1) & (6), 88 Stat. 55, 58, 60. Georgia's state agencies again complied. They continued compliance until in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the Supreme Court overruled its 1968 *Wirtz* decision and held that certain provisions of the FLSA were unconstitutional because they interfered with "traditional governmental functions" at the state and local level. After *Usery*, Georgia's state agencies changed their overtime-pay practices and estab-

lished a state-wide policy which, with only limited exceptions, *required* awarding compensatory time in lieu of cash payments for overtime work.

In 1985, the Supreme Court overruled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). State agencies in Georgia and elsewhere again began paying cash for overtime work as the FLSA required. This had an immediate and significant impact on many state and local treasuries. After much investigation and fact-finding, Congress once more amended the FLSA, this time to afford these governmental employers some relief from the burden of paying cash overtime compensation to their covered employees. Fair Labor Standards Amendments of 1985, Pub. L. 99-150, 99 Stat. 787.

These amendments allowed public employers to give compensatory time in lieu of cash for overtime hours worked under certain circumstances. *See* 29 U.S.C.A. § 207(o). Pursuant to these provisions, Georgia's state agencies on March 1, 1986 once more began awarding their employees compensatory time off for overtime work.

II.

The employees designated the Georgia State Employees' Association (GSEA) as their representative concerning overtime compensation, notified the State of this, and demanded that the State either negotiate with the representative about overtime compensation, or cease using compensatory time and begin cash payments for overtime hours. Asserting that the FLSA permitted its current practice and Georgia law prohibited it from negotiating with third parties over state employees' conditions of employment, the State refused to negotiate with GSEA and continued its compensatory-time policy.

The employees then filed this suit under the FLSA. The district court, relying on 29 C.F.R. § 553.23, determined that GSEA, as the employees' *designated* rep-

resentative, was a "representative" under 29 U.S.C.A. § 207(o)(2)(A)(i) for purposes of negotiating over compensatory time, and the State was required either to negotiate a compensatory-time agreement with GSEA or begin paying cash for the employees' overtime hours. The court enjoined the State's use, without an appropriate agreement, of compensatory time as to the employees represented by GSEA (subsequently determined to be all of the plaintiffs) and awarded the employees compensatory damages, costs, and attorneys' fees. *Dillard v. Harris*, 695 F.Supp. 565 (N.D.Ga. 1987).

On appeal, the State maintains that 29 U.S.C.A. §§ 207(o)(2)(A)(i) & (ii), the provisions allowing agreements on compensatory time, are unambiguous and require no resort to legislative history to determine their meaning. Alternatively, the State argues that even if there is sufficient ambiguity to merit an inquiry into Congressional intent, the legislative history, as evidenced by the report of the Senate Committee on Labor and Human Resources, reveals that the intended meaning to subclause (i)'s term "representative" is *recognized* representative. The State contends that the employees have no such recognized representative.

The employees respond that the intended meaning of the term "representative" in subclass (i) is sufficiently ambiguous to require an inquiry into legislative history. They rely primarily on Department of Labor (DOL) regulation 29 C.F.R. § 553.23 and the legislative history reflected in the report of the House Committee on Labor and Human Resources as proof that Congress intended for mere designative, not formal recognition, of a representative to be sufficient. GSEA clearly was the employees' *designated* representative.

III.

We are satisfied with the way the Fourth Circuit dealt with these arguments in *Abbott v. City of Virginia Beach*, —— F.2d at ——, stating that the statute

was unclear and looking to the legislative history, following the method of analysis of the district court. *Abbott v. City of Virginia Beach*, 689 F.Supp. 600 (E.D. Va. 1988). Equally satisfactory, in our judgment, would be this analysis: the statute on its face is plain, and the legislative history does not mandate a contrary interpretation.

IV.

Generally, if a statute is unambiguous on its face, the courts will look to legislative history only to see if there is a "'clearly expressed legislative intent' contrary to that language." *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12, 107 S.Ct. 1207, 1214 n.12, 94 L.Ed.2d 434 (1987) (citations omitted). If the Senate and House histories conflict, the history of the body in which the enacted bill originated is normally more persuasive. *Steiner v. Mitchell*, 350 U.S. 247, 254, 76 S.Ct. 330, 334-35, 100 L.Ed. 267 (1956).

The plain language of 29 U.S.C.A §§ 207(o)(2)(A)(i) & (ii) indicates that a State agency may use compensatory time only if it does so under subclause (i) pursuant to the terms of an agreement or understanding between the agency and its employees' representative, or if the employees are not covered by such an agreement, which resolves the issue as to whether compensatory time or cash for overtime is required, the question is resolved under subclause (ii) pursuant to an agreement or understanding with each employee It appears clear that the prerequisite for employees being "covered under subclause (i)" is an agreement or understanding between the employer and the employees' representative. Since the employees here had no agreement or understanding under subclause (i), they were not "covered" by it and thus were governed by subclause (ii). Of course, if there is no agreement with either the representative or an individual employee, then cash, rather than compensatory time, is required.

Since the plaintiffs here were "employees described in clause (A)(ii) hired before April 15, 1986" and the "regular practice in effect on April 15, 1986" was to award compensatory time in lieu of cash payments, this regular practice "constitute[d] an agreement or understanding under such clause (A)(ii)." 29 U.S.C.A. § 207 (o)(2)(B). Under this previously existing practice, the State could permissibly use compensatory time to pay the employees for overtime hours worked, absent a contrary agreement with an individual employee.

Having determined 29 U.S.C.A. § 207(o)(2)(A) to be unambiguous, we would then look to its legislative history only to determine whether it shows a clearly expressed intent contrary to this interpretation of the plain language.

V.

The legislative history reveals no single intent. Both the Senate and House introduced bills to amend the FLSA in 1985. S. 1570, 99th Cong., 1st Sess. (1985); H.R. 3530, 99th Cong., 1st Sess. (1985). Generally, the Senate and House committee reports reflected similar intent. Both reports noted disagreement in the testimony heard about the costs of governmental agencies' FLSA compliance with the overtime-pay provisions. The committee reports concluded that states and localities required to comply with the FLSA would be forced to assume additional financial responsibilities with in at least some instances the additional costs being substantial. S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985) ("S. Rep. No. 159"); H.R. Rep. No. 331, 99th Cong., 1st Sess. 17-18 (1985) ("H.R. Rep. No. 331").

The House committee report expressed an intent "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours worked by covered employees." H.R. Rep. No. 331 at 19. The committee recognized the mutual benefits arising

from and encouraged the continued use of compensatory time as under past arrangements. *Id.* at 19-20.

The Senate committee report likewise noted that many government employers and employees had in the past voluntarily reached compensatory time arrangements "reflect[ing] mutually satisfactory solutions that [were] both fiscally and socially responsible." S. Rep. No. 159 at 8.

The Senate's and House's respective versions of proposed 29 U.S.C.A. § 207(o)'s compensatory-time requirements differed in several respects, but contained similar provisions governing agreements to allow compensatory time in lieu of cash payments for overtime work. The joint committee on conference report indicated that there was initial disagreement and eventual compromise in several areas: the method for calculating payments for compensatory time due upon termination of employment, the treatment to accord substitute employment, the limit on allowable accrual of compensatory time, the scope of the anti-discrimination provision, and time limits on protection under certain provisions. H.R. Rep. No. 357, 99th Cong., 1st Sess. 7-9 (1985) ("H.R. Rep. No. 357").

The conference committee report mentioned no disagreement or compromise on the language governing compensatory-time agreements now contained in 29 U.S.C.A. § 207(o)(2)(A). H.R. Rep. No. 357 at 1-9. There was little to disagree over since the respective versions of this provision were so similar. Despite this absence of expressed disagreement and compromise, there was no stated consensus either. The legislative history reveals no clear answer to what effect the presence or absence of a "representative" (whatever that term is interpreted to mean) would have on whether employees are "not covered by" section 207(o)(2)(A)(i).

Thus, there is no clearly expressed legislative intent contrary to the plain language in the provision indicat-

ing that the presence or absence of an agreement is the factor determining whether employees are "not covered by subclause (i)." Although there are unclear and conflicting statements in the legislative history, this Court will not read into the statute a requirement not included in its plain language or clearly expressed in its history.

Even if we were to determine from the legislative history that Congress intended for the absence of a "representative" (rather than, as we interpret the statutory language to mean, the absence of an agreement or understanding) to be the factor making employees "not covered by subclause (i)," we would still conclude that the legislative history does not support the district court's ruling. The relevant provision ultimately contained in the Senate bill enacted was essentially identical to the language in both the original House bill and the original Senate bill. There were no significant differences. To the extent that the respective histories conflicted, however, the Senate history is more persuasive since the bill which was enacted originated there. *Steiner v. Mitchell*, 350 U.S. at 254, 76 S.Ct. at 334-35. The district court's order, however, did not even mention the Senate legislative history. *See Dillard v. Harris*, 695 F. Supp. 565 (N.D.Ga. 1987).

Although the *language* of their respective bills dealt similarly with compensatory-time agreements, the Senate and House committee reports included one potentially significant difference in what the committees intended. The Senate report repeatedly referred to the employees' "recognized representative" as the one with whom the employer must reach agreement before using compensatory time in lieu of cash payments under subclause (i). S. Rep. No. 159 at 10-11. The House report, on the other hand, stated that the employees have a subclause (i) "representative" whenever "the employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representa-

tive *designated by the employees.*" H.R. Rep. No. 331 at 20 (emphasis added). The House and Senate committee reports contain no explanation or resolution of this difference. The legislative history thus does not clearly answer whether Congress intended that, in a situation such as is presented here, the plaintiffs' mere designation of a representative satisfies subclause (i).

The House committee report tends to support the employees' argument that since they have designated a representative, subclause (i) applies. On the other hand, the Senate committee report's use of the term "recognized representative" tends to support the State's position that phrase means a representative with whom public agencies could lawfully negotiate, so that when state law prohibits such negotiation there can be no *recognized* representative. Since Georgia law prohibits state employers from recognizing third party representatives for purposes of negotiating with them over employment conditions, the employees lack the type of representative envisioned in subclause (i), and thus subclause (ii) applies.

VI.

The employees contend that even if the "recognized representative" construction is applied to subclause (i), under Georgia law public agencies *may* lawfully recognize and negotiate with employee representatives over conditions of employment. The case law, however, does not support their position.

In *International Longshoremen's Association, AFL-CIO v. Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733, 737, *cert. denied*, 370 U.S. 922, 82 S.Ct. 1561, 8 L.Ed.2d 503 (1962), the Georgia Supreme Court upheld an injunction against state employees picketing to force the Ports Authority to enter into a collective bargaining contract. The injunction was upheld because the picketing was for an illegal purpose. The court stated that

the Ports Authority was "without authority to enter into an agreement with any third party fixing the terms and conditions of the employment of the personnel working for the authority." *Id.*

Later, in *Chatham Association of Educators, Teachers Unit v. Board of Public Education,* 231 Ga. 806, 204 S.E.2d 138, 139-40 (1974), the Georgia Supreme Court refused to enforce a contract reached between a teachers' association and a local school board because the contract was void as an illegal attempt by the board to delegate its authority to control allocation of funds and conditions of teachers' employment.

More recent cases, such as *Local 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority,* 253 Ga. 219, 320 S.E.2d 742, 744 (1984), note that for Atlanta's mass transit system employees there is a statutory exception to the general principle that Georgia's governmental agencies have no authority to bargain with employee representatives over employment conditions.

Although citing no Georgia case law in their favor, the employees state that Georgia's Attorney General has suggested governmental employers have some discretion in "recognizing" and "bargaining with" employee unions. In a 1969 opinion the Attorney General stated:

> Inasmuch as I am unaware of any State statute which would require [state] hospitals to bargain collectively with hospital employees or their labor organizations, I conclude that no such legal obligation exists. This is not to say, of course, that the hospital employer could not bargain collectively if it voluntarily chose to do so.

Op. Ga. Att'y Gen., No. 69-262 (unofficial) (1969).

In 1975 the Attorney General's Office prepared a detailed position paper titled "Legal Status of Public

Employee Labor Organizations in Georgia." *See* Op. Ga. Att'y Gen., p. 457 (1975). The paper advised that a public employer's "recognition" of a representative for its employees and "collective bargaining" with that representative, as those terms are defined in the Labor Management Relations Act (LMRA) context, are illegal under Georgia law. *Id.* at 462-63.

The LMRA does not apply to public employees, the Attorney General reasoned, thus in the public employment context these terms may have meanings different from their precise LMRA definitions. The position paper concluded that under Georgia law, although a state employer may not lawfully enter into a binding collective bargaining contract with an employees' representative, it may, if it so desires, "meet and consult" with the representative over wages, hours, and conditions of employment and reach an understanding, which the employer could then voluntarily adopt according to its normal policy-making procedures without improperly delegating its decision-making authority or obligating itself to bargain similarly in the future. The Attorney General surmised that Georgia courts, if confronted with the question, would reach a similar conclusion, as some other states' courts have. *Id.* at 463-65.

If the Attorney General is correct, then Georgia's state employees may not obtain a collective bargaining contract to compel their agency to bargain with their representatives over compensatory time or other employment matters. The agency may, however, if it chooses, meet with the representatives, discuss virtually any employment matter, either adopt or reject the representatives' suggestions, and ultimately reach its own informed decision. Such a procedure merely allows employee representatives to have input into the agency's ultimate decision. Having input into an employer's decision is not the same as reaching an agreement or understanding. Such a procedure plainly does not author-

ize an "agreement" or "memorandum of understanding" between the agency and a representative, as required by 29 U.S.C.A. § 207(o)(2)(A)(i).

VII.

Since Georgia law does not permit such an agreement or understanding, the district court's reliance on 29 C.F.R. § 553.23 was misplaced. The regulation, like the House committee report, stated that a 29 U.S.C.A. § 207(o)(A)(2)(i) "representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." 29 C.F.R. § 553.23(b). The regulatory history, however, indicates that, in promulgating the regulation, DOL considered the effect of state law.

Prior to adopting the proposed regulation, DOL received comments from many public employers' and employees' organizations. 52 Fed. Reg. 2012-13 (Jan. 16, 1987). Several governmental organizations expressed concern over the above quoted language in the regulation and the impact it might have in states whose laws prohibited public agencies from recognizing and bargaining with employees' representatives. *Id.* at 2014. DOL responded as follows:

> The Department recognizes a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) [29 U.S.C.A. § 207(o)] *shall be determined in accordance with State or local law and practices.*

Id. at 2014-15 (emphasis added).

Under Georgia law, the employees have no representative able to bargain over compensatory time. Accordingly, when DOL adopted 29 C.F.R. § 553.23, it

did not intend for the regulation to have the impact of ignoring state law.

In the *Abbott v. City of Virginia Beach* opinion, the Fourth Circuit cited several cases which reached a contrary result, including the district court decision in this case, stating that they differed from *Abbott* in several key aspects. —— F.2d at ——. The Court noted that in *Abbott* the public employer, prohibited by state law from contracting with employee representatives, gave each employee an absolute choice of whether to accept compensatory leave in lieu of money.

The court differentiated the district court opinion in this case with the comment that the employer retained the sole discretion on whether to provide compensatory leave or money for overtime. There is nothing in this case, however, that would prevent an individual employee from negotiating for and obtaining an agreement that cash would be paid for his or her overtime work. Section 207(o)(2)(B) does prohibit an individual agreement, before performance of overtime work, with an employee hired prior to April 15, 1986, that the employee should receive cash. The legal issue turns on whether the pay is governed by a collective agreement or an individual agreement, and not on the procedures by which the agreement is made. The statute itself defines what the individual agreement will be for the employees hired prior to April 15, 1986, unless a different agreement is made by the employee and the employer. For employees hired after April 15, 1986, an agreement must be reached for the employer to provide compensatory time. Because of the congressional deference to the serious fiscal problems of public agencies, it is not unreasonable for the statute to give the state agencies the upper hand in this decision. In any event, if the mere designation of a representative with whom the agency could not legally make an agreement should be sufficient to control the method of compensation, it would have been simple for the statute to plainly so provide.

Conclusion

In summary, we hold that the district court erroneously applied 29 U.S.C.A. § 207(o)(2)(A)(i) and 29 C.F.R. § 553.23. The plaintiff employees were *not* covered by subclause (i) of section 207(o)(2)(A), and as a result *were* covered by subclause (ii). Under section 207(o)(2)(B), the practice in effect on April 15, 1986 constituted an agreement with respect to compensatory time, absent any contrary agreement between an employee and the state employer. Under that practice, the States' use of compensatory time was proper. We reverse the district court's summary judgment and its order enjoining the State's use of compensatory time, and we remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C86-834A

ALFREDA DILLARD, JIM DUVAL, IDA LEE, BETTY HOGAN, ANNIE MILLER, JOYCE CETTO, DORIS CAIN, and SAMMIE MCGLOTHA

vs.

JOE FRANK HARRIS, GEORGIA DEPARTMENT OF HUMAN RESOURCES and GEORGIA DEPARTMENT OF TRANSPORTATION

ORDER

This action is before the court on plaintiffs' motion for summary judgment. Defendants oppose the motion.

Plaintiffs brought this action seeking declaratory and injunctive relief and compensatory damages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. Plaintiffs allege that defendants violated the FLSA by adopting a policy of compensatory time off ("comp time") in lieu of overtime pay without an agreement with plaintiffs' representative, the Georgia State Employees Association. Defendants assert that they are in compliance with the FLSA. The material facts are not in dispute.

1. *Background*

On November 13, 1985, Congress amended the FLSA to require states and municipalities to provide overtime compensation to their employees for hours worked in excess

of 40 hours in any work week. The amendments, effective April 15, 1986, established procedures by which state and local governments could, under certain circumstances, provide for comp time in lieu of overtime pay.

In February 1986, the Georgia Department of Human Resources issued a memorandum advising all state facilities under its operation of a new policy on overtime compensation. That policy, effective March 1, 1986, requires "that overtime compensation be in the form of compensatory time rather than salary unless all alternatives have been found inappropriate and there are funds budgeted and approved for the purpose of overtime pay." Memorandum from Reuben W. Lasseter, Director, Office of Personnel Administration, to All Organizational Units, at 1-2 (February 7, 1986), attached as Exhibit I to plaintiffs' motion for summary judgment.

Plaintiffs are employees of three state hospitals operated by the Georgia Department of Human Resources ("Georgia "DHR"): Georgia Retardation Center ("GRC"), Central State Hospital ("CSH"), and Gracewood State School and Hospital ("GSSH"). Plaintiffs are non-exempt employees under the FLSA, which means that the 1985 amendments apply to them. Plaintiffs all are members of the Georgia State Employees Association ("GSEA"), which represents some employees at each of the three hospitals.

On April 4, 1986, GSEA sent letters to the superintendents of each of the three hospitals, demanding that pursuant to the 1985 amendments to the FLSA, the Georgia DHR enter into an agreement covering overtime compensation for GSEA members. *See* Exhibits D, E, and F to plaintiffs' motion. The letters did not result in any agreement, or apparently even any negotiations, between GSEA and the Georgia DHR.

On April 14, 1986, a petition containing the signatures of many employees at Georgia Retardation Center, including plaintiffs Dillard and DuVal, was delivered to

defendants. The petition designated the GRC Organizing Committee as the employees' representative for negotiations on several matters, including overtime compensation. On that same day, petitions signed by many employees at Central State Hospital, including plaintiffs Lee, Hogan, and Miller, and by employees at Gracewood State School and Hospital, including plaintiffs Criswell, Nicholson, and White, were sent to defendants. The CSH and GSSH petitions stated that:

> [w]e, the undersigned employees, . . . have no agreement on overtime compensation with the State of Georgia. Current Departmental memos do not reflect any agreement between us and the department. We hereby demand time-and-a-half cash payment for all overtime worked.

The petitions did not lead to any agreement between the parties on overtime compensation.

2. *Discussion*

The FLSA provision at issue here, 29 U.S.C. § 207 (o) (1), (2), are as follows:

> (o) Compensatory time
>
> (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only—
>
> (A) pursuant to—
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any

other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A) (ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A) (ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

In effect, the above provisions prohibit a state or local public agency from using comp time in lieu of overtime pay unless (1) the agency and the employees' representative reach an agreement permitting the use of comp time or (2) for employees not covered by such an agreement, the agency and each employee reach an individual agreement. Plaintiffs assert that where employees have designated a representative on the issue of overtime compensation, clause (A) (i) is the only means by which the public agency can provide comp time in lieu of cash overtime pay. The agency cannot refuse to negotiate with the representative and then, pursuant to clause (A) (ii), reach agreements with the individual employees who designated a representative to reach an agreement under clause (A) (i).

Defendants respond with a two-part argument. First, defendants assert that Georgia law prohibits them from

negotiating with third parties representing public employees as to the employees' terms of employment. *See International Longshoremen's Association v. Georgia Ports Authority*, 217 Ga. 712, 124 S.E.2d 733 (1962), *cert. denied*, 370 U.S. 922, 82 S.Ct. 1561 (1972). Thus, defendants assert that because the Georgia DHR legally cannot and in fact did not reach an agreement with GSEA regarding comp time under clause (A)(i), plaintiffs fall under clause (A)(ii). Second, defendants contend that under (A)(ii) no individual agreements are required because (1) plaintiffs were hired prior to April 15, 1986 and (2) the Georgia DHR had a "regular practice" in effect on April 15, 1986 providing for comp time. *See* paragraph following 29 U.S.C. § 207 (o)(2)(B).

In their reply brief, plaintiffs assert that clause (A)(ii), both by its own terms and as explained in the regulations, 29 C.F.R. § 553.23, has no application where there is an employee representative. *See Jacksonville Professional Fire Fighters Association Local 2961 v. City of Jacksonville*, No. 86-58-CIV-4, slip op. at 18-20 (E.D. N.C. May 28, 1987). Thus, plaintiffs assert, defendants have two choices: either enter into an agreement with plaintiffs' representative (GSEA) or pay cash overtime to the represented employees.

The argument that plaintiffs make is precisely the same argument as the fire fighters association made in *Jacksonville Professional Fire Fighters*. In that case, defendant City of Jacksonville refused to negotiate with plaintiffs' representative because defendant contended that any agreement reached would be illegal under North Carolina law, N.C. Gen. Stat. § 95-98. Plaintiffs responded that an agreement would not violate state law because plaintiffs' representative need not be a recognized, formal collective bargaining agent. *See* 29 C.F.R. § 553.23(b)(1). Alternatively, plaintiffs argued that if North Carolina law did prohibit the city from entering

into an agreement with public employees, the 1985 amendments preempt inconsistent state law and require the city to enter into an agreement. Based on the regulatory provisions interpreting the 1985 amendments, the court found it unnecessary to decide whether state law prevented the city from entering into an agreement and whether the 1985 amendments preempted inconsistent state law. Instead, the court held only that an agreement pursuant to 29 U.S.C. § 207(o)(2)(A)(i) is the only manner in which the city could provide comp time where the fire fighters designated a representative. This court believes that the court in *Jacksonville Professional Fire Fighters* reached the correct result.

The regulations provide that where the employees have selected a representative, an agreement is required between the employer and the employees' representative as a condition for the use of comp time in lieu of overtime payment in cash. 29 C.F.R. § 553.23(a)(1). "[T]he representative need not be a formal or recognized bargaining agent *as long as the representative is designated by the employees.*" 29 C.F.R. § 553.23(b)(1) (emphasis added). Where the employees *do not have* a recognized or otherwise *designated representative*, the agreement or understanding concerning comp time must be between the public agency and the individual employee. 29 C.F.R. § 553.23(c)(1). The regulations clearly foreclose defendants' argument that because defendants cannot legally enter into an agreement with plaintiffs, the regular practice in effect on April 15, 1986 (which provides for comp time) constitutes an implied agreement between defendants and each individual employee. 29 C.F.R. § 553.23(c)(2) provides that the "regular practice" provision applies only "in the case of *employees who have no representative* and were employed prior to April 15, 1986. . . ."

The court recognizes that the regulations interpreting a statute are not conclusive as to the meaning of the

statute. However, where the meaning of the statute is ambiguous, the court should give considerable deference to the agency charged with administering the statute. *See Chemical Manufacturers Association v. Natural Resources Defense Council*, —— U.S. ——, ——, 105 S.Ct. 1102, 1103 (1985). The Secretary of Labor, who issued the above regulations, is in a certain sense charged with administering the 1985 amendments. The Secretary may bring an action to enforce the overtime compensation provision and to collect unpaid overtime compensation owing. *See* 29 U.S.C. § 216(b), (c). The court therefore concludes that the reasonable regulations adopted by the Secretary are entitled to deference insofar as they are not inconsistent with the language of the 1985 amendments.

The court notes that the principal drafters of the 1985 amendments intended the result the court reaches here. In a letter dated September 26, 1986 to the Department of Labor from the principal drafters of the 1985 amendment, the drafters state the following:

> Section 2 of the 1985 Amendments provides that state and local governments may use compensatory time in lieu of cash payment for overtime only after certain conditions are met. Among those conditions is the agreement of representatives of the employees involved where such employees have designated a representative. (See FLSA Section 7(o)(2)(A)(i), as added by Section 2(a) of the 1985 Amendments.) We were careful in developing the amendment to be clear that the representative need not be a formally recognized collective bargaining representative and that recognition by the employer was not required . . . .
>
> It is the employees' designation, and not the employer's recognition or attitude toward that representative, that is vital. FLSA Section 7(o)(2)

(A)(i) was not specifically drafted to avoid any requirement of formal recognition. During the consideration of the legislation, specific references were made to a number of states where NLRA collective bargaining style recognition does not exist; [sic] but where large numbers of fire, police, and general public employees belong to labor organizations. We intended the FLSA requirement of an agreement on compensatory time to apply in those situations.

Finally, we understand that some employers or employer representatives may have suggested that the final paragraph following the new FLSA Section 7(o)(2)(B) was intended to provide that the Section (A(i) requirement of an agreement with the employee representative is not applicable to situations where a regular compensatory time practice was in effect on April 15, 1986. As is clear from the express language of that paragraph, the rule with regard to practices in effect on April 15, 1986, applies *only* to Section (A)(ii) situations in which no representative is involved.

Because plaintiffs at Georgia Retardation Center have designated a representative[1] to meet with defendants regarding overtime compensation, defendants must pay cash overtime compensation to these plaintiffs unless and until an agreement with the GRC Organizing Committee regarding comp time is reached. Plaintiffs at Central State Hospital and Gracewood State School and Hospital did not designate a representative in their petitions to defendants. The court cannot determine whether plaintiffs at CSH and GSSH intended GSEA to represent them, and therefore the court cannot now determine

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[1] Plaintiffs at GRC, in their petitions to defendants, designated the GRC Organizing Committee to represent them as to the issue of overtime compensation.

whether defendants can continue to pay comp time to these employees.[2]

Because plaintiffs have not adequately addressed the scope of relief in their motion for summary judgment, the court does not decide this issue. Moreover, plaintiffs have not addressed the issue of whether the similarly situated employees, who are purported to be included as plaintiffs in this action, can be deemed to have given their consent to this action by virtue of signing the petitions. The court will direct the parties to file briefs addressing the issues of (1) who, if anyone, was designated to represent plaintiff employees at CSH and GSSH,[3] (2) what is the appropriate relief under 29 U.S.C. §§ 216, 217, and (3) which employees are entitled to that relief.

Accordingly, plaintiffs' motion for summary judgment is GRANTED in part as set forth in this order. Plaintiffs are DIRECTED to file a brief addressing the issues set forth in the preceding paragraph within thirty (30) days of entry of this order. Defendants shall have ten (10) days from the date plaintiffs effect service of their brief to file a brief in response.

SO ORDERED, this 30 day of SEPTEMBER, 1987.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

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[2] The court does not address whether defendants had a "regular practice" of using comp time on April 15, 1986. *See* 29 U.S.C. § 207(o)(2)(A)(ii).

[3] If the court finds that plaintiffs at CSH and GSSH did not designate a representative on the issue of overtime, the court may be compelled to decide the issue of whether the Georgia DHR had a "regular practice" of comp time in effect on April 15, 1986.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:86-cv-834-RCF

ALFREDA DILLARD, JIM DUVAL, IDA LEE, BETTY HOGAN, ANNIE MILLER, JACQUELYN PARHAM, DORIS CAIN, MAE CRISWELL, ERNEST NICHOLSON and DOROTHY WHITE, for and on Behalf of Themselves and Others Similarly Situated

vs.

JOE FRANK HARRIS and Georgia Department of Human Resources

ORDER

[Filed March 30, 1988]

This action is before the court on defendants' motion for reconsideration or, alternatively, to amend the court's order to allow defendants to pursue an interlocutory appeal. Also to be decided by the court are certain issues that the court directed the parties to brief.

1. *Background*

On September 30, 1987, the court entered an order holding that under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, defendants must pay cash overtime to their employees unless and until defendants and the employees' designated representative(s) reach an agreement permitting defendants to pay compensatory time off (comp time) in lieu of cash over-

time. *See* 29 U.S.C. § 207(o). Because plaintiffs Dillard and Duvall have designated a representative, the court ruled that defendants must pay cash overtime to these plaintiffs until an agreement is reached concerning comp time. However, because it was unclear whether plaintiffs employed at Central State Hospital (CSH) and Gracewood State School and Hospital (GSSH) designated a representative, the court could not determine "whether defendants can continue to pay comp time to these employees." Order of September 30, 1987 at 10. The court directed the parties "to file briefs addressing the issues of (1) who, if anyone, was designated to represent plaintiff employees at CSH and GSSH, (2) what is the appropriate relief under 29 U.S.C. §§ 216, 217, and (3) which employees are entitled to that relief." *Id.* (footnote omitted).

2. *Motion for Reconsideration*

Defendants request the court to reconsider its September 30 order or, alternatively, to amend the order to permit defendants to pursue an interlocutory appeal and to stay the proceedings pending the outcome of the appeal. Defendants assert three grounds in support of their motion to reconsider. First, defendants contend that the order violates the Tenth Amendment because it forces the State of Georgia to negotiate with third parties concerning state employees' terms and conditions of employment in violation of Georgia law, practices, and public policy. Second, defendants assert that the order is contrary to the Department of Labor's regulations governing agreements between public agencies and third party representatives of public employees. Defendants point to the Department's statement that "whether employees have a representative for purposes of [section 207(o)] shall be determined in accordance with state or local law and practices." *See* 52 Fed. Reg. 2014, 2015. Finally, defendants contend that the court should have

given no weight to a post-enactment letter prepared by the principal drafters of the 1985 amendments to the FLSA because it is hearsay and not a part of the legislative history.

Plaintiffs assert that the court's interpretation of the FLSA does not contravene the Tenth Amendment (1) because that interpretation does not require defendants to negotiate with plaintiffs' representatives and (2) because the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), clearly holds that the Tenth Amendment does not circumscribe Congress' power under the Commerce Clause to make the FLSA applicable to state employees. Plaintiffs further contend that the regulations adopted pursuant to the FLSA are consistent with the court's interpretation.

The court rejects defendants' Tenth Amendment argument. Under the court's interpretation, the FLSA does not require defendants to negotiate with plaintiffs' representatives. Rather, the FLSA requires defendants to pay plaintiffs overtime at a rate not less than one and one-half times plaintiffs' regular rate of pay, *see* 29 U.S.C. § 207(a), *unless* defendants exercise their option of negotiating an agreement with plaintiffs' representatives concerning comp time in lieu of cash overtime, *see* 29 U.S.C. § 207(o). Congress clearly may require defendants to pay time and one-half overtime to their employees without running afoul of the Tenth Amendment. *See Garcia*, 469 U.S. 528, 105 S.Ct. 1005. Congress does not violate the Tenth Amendment by giving defendants the option of negotiating with plaintiffs' representatives to reach an agreement permitting defendants to pay comp time in lieu of cash overtime.

The court also rejects defendants' contention that the September 30 order is contrary to the regulations interpreting the FLSA. As plaintiffs point out, defendants' reference to the Department of Labor's intention as ex-

pressed in the Federal Register clearly is taken out of context. The Department's statement that "whether employees have a representative for purposes of [section 207(o)] shall be determined in accordance with state or local law and practices" was made in the context of determining whether employees who have a labor representative pursuant to a collective bargaining agreement could designate a different representative, in violation of the bargaining agreement, to represent them on the issue of overtime. Because Georgia has no collective bargaining for state employees, the Department's interpretation is inapplicable to plaintiffs.

As to defendants' final argument, the court agrees with defendants that no weight should be given to the letter written by the drafters of the 1985 amendments to FLSA. However, it is clear from the September 30 order that the court in no way relied on the letter in reaching its conclusion. *See* Order of September 30, 1987 at 8. Thus, the court finds that this argument does not require the court to reconsider its order, and, therefore, the court will deny defendants' motion.

In the alternative, defendants request that the court amend its September 30 order to permit defendants to proceed with an interlocutory appeal. The court will deny this motion because the court expects a final judgment to be entered shortly in this action.

3. *Issues of Representation and Relief*

The parties are in agreement as to most of the issues concerning appropriate relief under 29 U.S.C. §§ 216, 217.[1] Defendants concede that plaintiffs are entitled to declaratory and injunctive relief prohibiting defendants

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[1] In addressing the proper scope of relief and the issue of representation, defendants do not waive their rights of appeal or arguments concerning the correctness of the court's September 30, 1987 order.

from paying comp time in lieu of cash overtime to all employees who have designated a representative pursuant to 29 U.S.C. § 207(o)(2)(A)(i) unless and until defendants and the representatives enter into an agreement concerning overtime compensation. Additionally, defendants do not dispute plaintiffs' entitlement to attorney's fees and costs, although they reserve the right to object to the reasonableness of plaintiffs' request.[2] Finally, defendants do not object to paying cash overtime to plaintiffs Dillard and Duvall for overtime hours they have worked since April 16, 1986 and for which they have not received cash overtime and have not used the comp time earned.

As to plaintiffs who work at CSH and GSSH, defendants contend that these plaintiffs will be entitled to receive cash overtime only after they designate a representative on the issue of overtime. Defendants assert that these plaintiffs have failed to "designate" a representative pursuant to section 207(o)(2)(A)(i) because "designation" requires that the *employee* directly inform his employer of his selection of a third party represent him. It is not sufficient, defendants contend, for the *representative* to inform the employer that he is acting as the employee's representative.

Plaintiffs respond that it is enough under section 207(o) for an employee to designate a representative and have the representative notify the employer that he is acting on the employee's behalf. If the employer has any doubts about whether such designation was made, the employer can obtain confirmation from the employee. The burden, plaintiffs assert, is on the employer if he doubts that a third party is acting as an employee's representative.

The court agrees with plaintiffs' common-sense approach. Plaintiffs' representative, the Georgia State Em-

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[2] Plaintiffs have not yet submitted their fee request.

ployees Association (GSEA), sent letters to defendants notifying defendants that GSEA was the representative for many of defendants' employees on the issue of overtime compensation. *See* Exhibits D, E, F to plaintiffs' motion for summary judgment. Defendants did not request GSEA to provide a list of members so that defendants could verify the employees' designation of GSEA as their representative. Nor did defendants ask GSEA to have its members notify defendants directly of their (the employees') designation of GSEA as their representative. It is clearly too late for defendants to argue now that plaintiffs should have directly notified defendants of their designation. Therefore, the court concludes that all named plaintiffs are entitled to cash overtime for overtime hours worked after April 15, 1986 and for which plaintiffs have not received payment and have not used comp time earned.

Accordingly, defendants' motion for reconsideration or, alternatively, to amend the September 30, 1987 order is DENIED. The court hereby permanently ENJOINS defendants from paying plaintiffs comp time in lieu of cash overtime unless and until defendants have entered into an agreement with the representative(s) concerning overtime compensation.[3] Defendants are DIRECTED to submit within twenty (20) days of the filing of this order work records showing the number of hours of overtime each plaintiff (except Dillard and Duvall) has worked since April 16, 1986; the number of hours for which they have received cash payments; the number of hours of comp time accrued; and the number of hours of

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[3] The practical effect of this injunction is to prohibit defendants from paying comp time to any state employee who designates a representative pursuant to 29 U.S.C. § 207(o)(2)(A)(i) unless defendants and the representative have agreed otherwise. If defendants continue to pay comp time to similarly situated employees, defendants certainly will be liable for liquidated damages (as well as backpay) because defendants' refusal to pay cash overtime would not be in good faith. *See* 29 U.S.C. § 216(b).

comp time used. Plaintiffs are DIRECTED to submit their fee request within twenty (20) days of the filing of this order. Such request should include an affidavit of counsel detailing the number of hours and precise nature of the work performed in this litigation and affidavits concerning a reasonable hourly rate. *See Norman v. Housing Authority of City of Montgomery*, No. 87-7763 (11th Cir. Feb. 1, 1988). Defendants will have ten (10) days to respond to plaintiffs' fee request.

SO ORDERED, this 30 day of MARCH, 1988.

/s/ Richard C. Freeman
RICHARD C. FREEMAN
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-8245, 88-8439

ALFREDA DILLARD, *et al.*,
Plaintiffs-Appellees,

versus

JOE FRANK HARRIS, and GEORGIA DEPARTMENT OF HUMAN RESOURCES,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING

(April 18, 1990)

BEFORE: RONEY and HILL, Senior Circuit Judges, and HOWARD*, U.S. District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellees is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

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* Hon. Alex T. Howard, Jr., U.S. District Judge, for the Southern District of Alabama.

APPENDIX E

29 U.S.C. § 207(o)(1)-(2)

§ 207. Maximum hours.

* * * *

(o) (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A) (ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in

lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

APPENDIX F

29 C.F.R. § 553.23

§ 553.23 Agreement or understanding prior to performance of work.

(a) *General.* (1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7 (o) (2) (A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. If the employees do not have a representative, compensatory time may be used in lieu of cash overtime only if such an agreement or understanding has been arrived at between the public agency and the individual employee before the performance of work. No agreement or understanding is required with respect to employees hired prior to April 15, 1986, who do not have a representative, if the employer had a regular practice in effect on April 15, 1986, of granting compensatory time off in lieu of overtime pay.

(2) Agreements or understandings may provide that compensatory time off in lieu of overtime payment in cash may be restricted to certain hours of work only. In addition, agreements or understandings may provide for any combination of compensatory time off and overtime payment in cash (e.g., one hour compensatory time credit plus one-half the employee's regular hourly rate of pay in cash for each hour of overtime worked) so long as the premium pay principle of at least "time and one-half" is maintained. The agreement or understanding may include other provisions governing the preservation, use, or cashing out of compensatory time so long as these provisions are consistent with section 7(o) of the Act. To the extent that any provision of an agreement or understanding is in

violation of section 7(o) of the Act, the provision is superseded by the requirements of section 7(o).

(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

(2) Section 2(b) of the 1985 Amendments provides that a collective bargaining agreement in effect on April 15, 1986, which permits compensatory time off in lieu of overtime compensation, will remain in effect until the expiration date of the collective bargaining agreement unless otherwise modified. However, the terms and conditions of such agreement under which compensatory time off is provided after April 14, 1986, must not violate the requirements of section 7(o) of the Act and these regulations.

(c) *Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept. (See § 553.50.) An employer need not adopt the same agreement or understanding with different employees and need not provide compensatory time to all em-

ployees. The agreement or understanding to provide compensatory time off in lieu of cash overtime compensation may take the form of an express condition of employment, provided (i) the employee knowingly and voluntarily agrees to it as a condition of employment and (ii) the employee is informed that the compensatory time received may be preserved, used or cashed out consistent with the provisions of section 7(o) of the Act. An agreement or understanding may be evidenced by a notice to the employee that compensatory time off will be given in lieu of overtime pay. In such a case, an agreement or understanding would be presumed to exist for purposes of section 7(o) with respect to any employee who fails to express to the employer an unwillingness to accept compensatory time off in lieu of overtime pay. However, the employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

(2) Section 2(a) of the 1985 Amendments provides that in the case of employees who have no representative and were employed prior to April 15, 1986, a public agency that has had a regular practice of awarding compensatory time off in lieu of overtime pay is deemed to have reached an agreement or understanding with these employees as of April 15, 1986. A public agency need not secure an agreement or understanding with each employee employed prior to that date. If, however, such a regular practice does not conform to the provisions of section 7(o) of the Act, it must be modified to do so with regard to practices after April 14, 1986. With respect to employees hired after April 14, 1986, the public employer who elects to use compensatory time must follow the guidelines on agreements discussed in paragraph (c)(1) of this section.

APPENDIX G

52 Fed. Reg. 2014-15 (January 16, 1987)

Section 7(o) Compensatory Time and Compensatory Time Off.

* * * *

Section 553.23 Agreement or understanding prior to performance of work.

The NLOC commented that language should be added to paragraph (a)(1) of this section to clarify that no agreement or understanding on compensatory time is required with respect to employees hired prior to April 15, 1986, if the public agency had a regular practice of granting compensatory time in lieu of overtime pay prior to that date. The Department agrees that clarifying language is needed. However, the statute provides that this exception only applies to employees not covered by ". . . a collective bargaining agreement (CBA), memorandum of understanding, or any other agreement between the public agency and representatives of such employees". Both the House and Senate reports also plainly state that the exception for a "prior practice" in lieu of an agreement or understanding was intended to be applicable only to employees who do not have a representative. (See H. Rep., p. 20 and Senate Report No. 99-159, p. 11 (hereinafter cited as S. Rep.).) Accordingly, paragraph (a)(1) of the regulations has been modified to add clarifying language.

* * * *

Various commenters, particularly representatives of cities, expressed concern with the statement in § 553.23 (b)(i), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commenters objected to this provision because they believed that it would require a collective bargaining obligation between a public

employer and its employees, when no such bargaining obligation currently exists under State or Federal law. They felt that in those jurisdictions where there is no requirement that employers meet and deal with employee representatives, employee organizations could attempt to establish a collective bargaining obligation via these regulations. They were also concerned that this subsection is not clear about the employer's obligation to "recognize" any representative, that conceivably an employer could find itself dealing with a different representative for each employee. They believed that § 553.23(b)(i) should operate only where collective bargaining obligations are provided by State law.

A city government suggested that where employees are not represented by a collective bargaining agent, the agreement for compensatory time should be made only with the public agency's authorized representative.

Another commenter suggested that, since most cities and towns have not recognized a union or other employee association, subsection (b) be revised to clarify that the agency must only reach agreement with "recognized" units.

The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggest that "recognized representative" mean an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.

The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a

representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA Section 7(o) shall be determined in accordance with State or local law and practices.

In addition, to clarify the fact that the representative of the employees need not be formal or recognized collective bargaining agent, the Department has modified § 553.23(c)(1), as suggested by the National Education Association (NEA), to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative.

* * * *

APPENDIX H

LEGAL STATUS OF PUBLIC EMPLOYEE LABOR ORGANIZATIONS IN GEORGIA

INTRODUCTION

During the past year the office of the Attorney General has received an increasing number of requests for advice in connection with the legal status of public employee labor organizations in Georgia. These requests have come from both public employees desiring to know the extent to which they may lawfully become involved in labor union activities, and from concerned state department and agency officials who are equally desirous of knowing what their rights and obligations are with respect to union activities on the part of the public employees under their supervision. As we shall soon see, a great many of the questions which have been raised really relate not so much to law as they do to agency policy and administrative discretion. It goes without saying that the disposition of questions of this sort addresses itself ultimately to the sound discretion of the policy-making officials of the affected state departments or agencies. It is equally true, on the other hand, that there are legal considerations which must be taken into account in this policy-making process. It is for this reason that the office of the Attorney General feels obligated to present this review of the legal parameters of the matter.

THE HISTORICAL BACKGROUND IN BRIEF

In the early years of this century a number of Danbury, Conecticut's hatters decided to affiliate with a labor union as a means of improving their working conditions. Sometime thereafter, the union-member employees of one hat manufacturer which refused to recognize or deal with the union went on strike. In conjunction with the strike, the union and its members sponsored a boycott of

the manufacturer's hats. The 1908 response of the Supreme Court of the United States to this seemingly commonplace use of organized labor's two most powerful weapons was to declare the union's action to be an unlawful combination and conspiracy in restraint of trade under the Sherman Antitrust Act. See *Loewe v. Lawlor*, 208 U.S. 274 (1908); *Lawlor v. Loewe*, 235 U.S. 522 (1915). This decision was followed almost immediately by the court's striking of a Kansas statute which attempted to outlaw the practice of an employer requiring its employee, as a condition of his employment, not to become a member of a labor union (i.e., the so-called "yellow dog" contract). *Coppage v. Kansas*, 236 U.S. 1 (1915). The court held that the Kansas statute violated the "liberty" and "property" rights secured to *the employer* by the "due process" clause of the Fourteenth Amendment. Using language quite reminiscent of Anatole France's reputed quip about "the majestic equality of the law which forbids both the poor and the rich alike from sleeping under the bridges," the court said that "It takes two to make a bargain," that if the employee didn't like this condition, he could always decline employment, and that the "liberty of contract" which the court was protecting applied to both parties equally. In a dissent which has proved him to be as accurate a prognosticator of the law here as he has been in other areas, Justice Holmes criticized this "reasoning" of the majority in *Coppage* [Justices Day and Hughes also dissented], pointing out that there just might be something to be said for trying "to establish the *equality of position between the parties* in which liberty of contract begins." 236 U.S. at p. 27 (Emphasis added.)

Needless to say, Justice Holmes' view has prevailed and the *Danbury Hatters* case and *Coppage* have long since been laid to rest. Actually congressional reaction came rather quickly. Sections 6 and 20 of the Clayton Act (15 U.S.C. § 17 and 29 U.S.C. § 52), enacted in late 1914, provided that nothing in the antitrust laws was to

be construed to forbid the existence and operation of labor unions, that labor unions and their members were *not* to be construed to be illegal conspiracies in restraint of trade, and that federal courts were *not* (with certain exceptions) to grant injunctions in cases between an employer and employee growing out of a dispute over the terms or conditions of employment. When Congress later considered the courts to be overly restrictive in applying this statutory exemption of labor from the antitrust laws [1] its response was to tighten the screws further by the Norris-La Guardia Act of 1932 (29 U.S.C. §§ 101-110, 113-115). This Act absolutely removed *the jurisdiction* of any court of the United States to enter an injunction "in a case involving or growing out of a labor dispute" unless certain specified circumstances existed (e.g., unlawful acts threatening injury to property, with police officers being unable or unwilling to furnish adequate protection). The Norris-La Guardia Act also rejected *Coppage*, both as to its holding and as to its rationale, by declaring "yellow dog" contracts to be contrary to public policy and unenforceable in any court of the United States.[2] The Congress recognized the realities of life pointed to by Anatole France and Justice Holmes (which the majority of the court in *Coppage* had rejected in favor of its highly fictional "equal liberty to contract" theory) when it declared that public policy of the United States recognized the fact that:

> ". . . under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom

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[1] In *Bedford Cut Stone Co. v. Journeymen Stone Cutter's Ass'n*, 274 U.S. 37 (1927), for example, the court limited the scope of Section 20 to disputes between an employer and his own employees.

[2] 29 U.S.C. § 103.

of labor, and thereby to obtain acceptable terms and conditions of employment. . . ." 29 U.S.C. § 102.

This recognition of the factual discrepancy between (not to mention the inevitable consequences of) the real bargaining positions of the individual employee and his employer (more often than not a corporation) culminated three years later with the National Labor Relations Act of 1935, 29 U.S.C. § 151 et seq., which provided for a comprehensive regulatory code for labor relations in all areas affecting interstate and foreign commerce. The NLRA secured to those employees covered by the Act the right to organize, the right to bargain collectively through representatives of their own choosing, and the right to engage in concerted activities (e.g., strikes and boycotts) to achieve these and other legitimate union ends (e.g., improved wages and other conditions of employment). See, generally, 29 U.S.C. §§ 151-168; 48 Am. Jur.2d, *Labor and Labor Relations*, § 9. For an employer to refuse to bargain collectively with a labor union representing a majority of its employees (or the majority of the employees of one of its "bargaining units") became an "unfair labor practice" subject to a cease and desist order of the newly-created National Labor Relations Board, 29 U.S.C. § 160.[3]

If anything, the NLRA worked only too well for the cause of organized labor. Over the years its application appeared to many to be overly one-sided and not sufficiently protective of the employer against unfair labor practices by unions. Consequently the Congress amended the NLRA by passing the Labor-Management Relations

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[3] The constitutionality of this congressional reversal of the Supreme Court's earlier constitutional interpretations in the *Danbury Hatters* case and *Coppage* was upheld on the theory that it was a proper exercise of Congress's power under the commerce clause to deal with the burden which strikes, boycotts and other labor disturbances placed upon interstate commerce. See *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 8 (1937).

Act of 1947 (i.e., the Taft-Hartley Act), 61 Stat. 136 et seq. See, e.g., 29 U.S.C. §§ 158 (b), 174. As amended by the Taft-Hartley Act, the NLRA (sometimes referred to in its amended form as LMRA) continues today to provide the basic statutory framework for labor organizations and collective bargaining *in the general industrial setting.*

Not surprisingly this massive statutory treatment has been accompanied by and continues to be accompanied by a large number of judicial decisions. However, it is not the purpose of this memorandum to review the minutia of labor relations law with respect to *general industry.* We are here concerned with the status of the law with respect to union organization and activities *on the part of public employees in the State of Georgia.* While the foregoing extremely cursory review of the development of federal law concerning labor organizations and relations *in the general industrial setting* is relevant to a discussion of labor organizations *of public employees* in terms of the general concepts involved (e.g., collective bargaining, etc.), and as a reflection of underlying philosophy of legislators and courts, it does not precisely answer the questions we shall deal with in this memorandum. Public employment and the necessity of the state's performance of essential functions frequently poses different and additional problems. It is one thing if recreational employees are on strike (whether employed by a public or private body) and quite another if police or firemen go out on strike. One might produce but a public inconvenience which is acceptable (no recreational service in public or private parks) while another might result in a public catastrophe (no police or fire protection). In recognition of the differing values which may be involved when it comes to public employment the Congress has here left the matter to be dealt with by the various states (whose operations are directly affected). Both before and after the 1947 amendment the Congress

has seen fit to exclude public employees from NLRA-LMRA coverage. The term "employer," as defined by 29 U.S.C. § 152, expressly excludes:

"any state or political subdivision thereof." [4]

It is in this light that we proceed to discuss the extent to which the various labor relations *concepts* of NLRA and LMRA may be applicable to labor organizations of public employees. In specificity we shall look at:

(1) Whether Public Employees Have Any Right to Organize or Become Members of a Labor Union.

(2) Union "Recognition."

(3) Collective Bargaining.

(4) Collective Bargaining Contract.

(5) Strikes.

(6) Picketing.

(7) "Closed Shop."

(8) "Checkoff" of Union Dues.

THE RIGHT OF PUBLIC EMPLOYEES TO ORGANIZE OR BECOME MEMBERS OF A LABOR UNION

It is no longer open to question that public employment cannot be used as a means of compelling the employee to waive or forego constitutionally protected rights. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967). It is similarly settled that "freedom of association" is a First Amendment (Ga. Code Ann.

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[4] See also 29 U.S.C. § 142. In *International Longshoremen's Ass'n, AFL-CIO v. Georgia Ports Authority*, 217 Ga. 712 (1) (1962), the Supreme Court of Georgia construed a state authority to be within this "state and political subdivision" exemption and hence not subject to the Act.

§ 1-801) right applicable to the states by virtue of the Fourteenth Amendment (Ga. Code Ann. § 1-815 to 1-819). *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460-463 (1958).

The application of these principles to an attempt to prohibit public employees from becoming members of labor organizations was squarely presented to the courts in *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D. N.C. 1969) [three-judge]. Members of the Charlotte Fire Department filed suit attacking the constitutionality of North Carolina statutes which (1) prohibited public employees from being members of a labor union and (2) prohibited contracts between units of government and labor organizations concerning public employees. While the three-judge district court upheld the statutory prohibition of contracts between governmental units and unions, it flatly held that the attempt to prohibit public employees from even being members of a union was on its face an intolerable overbreadth which infringed upon their constitutionally protected "freedom of association." Observing that:

> "It is beyond argument that a single individual cannot negotiate on an equal basis with an employer who hires hundreds of people. Recognition of this fact of life is the basis of labor-management relations in this country." 296 F. Supp. at p. 1075,

the court concluded:

> ". . . the firemen of the City of Charlotte are granted the right of free association by the First and Fourteenth Amendments to the United States Constitution; that that right of association includes the right to form and join a labor union—whether local or national. . . ." 296 F. Supp. at p. 1077.

This rationale has been even more recently applied right here in Georgia where a three-judge federal district court for the Northern District of the State, following

Atkins, held that Ga. Code Ann. § 54-909 (Ga. Laws 1953, Nov. Sess., p. 624) (which prohibited police officers from becoming members of a union) was unconstitutional. See *Melton v. City of Atlanta, Georgia*, 324 F. Supp. 315 (N.D. Ga. 1971) [three-judge]. In *Melton*, the court took great care to point out that the constitutional defect lay in the overbreadth of the statute (i.e., its extension far beyond anything necessary to protect any valid state interests) and that the court was not holding that the state could not prohibit strikes by police officers. Ibid. at pp. 318-320.

The conclusions of *Atkins* and *Melton* are in line with what the courts have held elsewhere (see e.g., *American Federation of State, County & Municipal Employees, AFL-CIO v. Woodward*, 406 F.2d 137, 193 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968)), and it is perhaps also worthy of mention that the office of the Attorney General of Georgia said the same thing as early as 1969, to-wit:

> ". . . the basic right of all individuals, including [state] hospital employees, to join labor organizations is undoubtedly protected by the First Amendment to the United States Constitution." Opp. Att'y Gen. 69-262.[5]

For all of these reasons, the *constitutional* right of public employees in Georgia to organize or to become members of labor unions can no longer be doubted.

UNION RECOGNITION

As used in connection with the Labor Management Relations Act (LMRA), "union recognition" has a fairly precise meaning. It refers to the employer's obligation under that Act to "recognize" and bargain collectively with that union which has been freely chosen by a majority of the employees in an appropriate "bargaining

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[5] See also Op. Att'y Gen. 69-379.

union" to represent them.[6] Proof of majority representation can be evidenced by various means, such as the union's disclosure of signed authorization cards by employees. If and when a dispute on the matter exists the issue may be determined by an NLRB sponsored election followed by the board's "certification" of the union as the official representative of the employees (if this is the result of the election). 29 U.S.C. § 159(c); 51 C.J.S. *Labor Relations*, §§ 170, 172. "Recognition," whether by election and certification or by agreement, is exclusive. Having "recognized" one union as the representative of th employees in a bargaining unit, the employer is under a duty *not* to bargain with anyone else. 29 U.S.C. § 159(a); 51 C.J.S. *Labor Relations*, § 162. In summary, union "recognition" in the context of LMRA relates to the question of whether a labor union in fact represents the majority of employees required to place a collective bargaining obligation on the employer.

With respect to public employees (which as we have already seen are excluded from LMRA coverage) the term is of more questionable significance. As we will show in more detail in the following section of this memorandum, there is no such thing as *compulsory* "collective bargaining" with respect to public employees in Georgia. This by itself would seem to rule out the general LMRA meaning of the term (i.e., its use in connection with the employer's legal obligation to bargain with that labor union which represents a majority of the employees in a given bargaining unit). Thus to the extent that it has any meaning at all *in the context of public employment*, "recognition" would seem to relate simply to that sort of recognition or acknowledgement in the dictionary sense which a governmental agency may, *if it so desires*, ac-

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[6] An appropriate bargaining unit is an employee unit, a craft unit, a plant unit, or a subdivision thereof, as determined by the National Labor Relations Board (NLRB). 29 U.S.C. § 159(b). It is majority representation in this "unit" which controls. 29 U.S.C. § 159(a); 51 C.J.S. *Labor Relations*, § 165.

cord to any given factual circumstances, including the fact that a number of its employees are members of a particular social, religious or labor organization. It goes without saying that in the public sector such "recognition" doesn't carry the legal obligations it does for private employers who are covered by LMRA, and among other things any sort of "recognition" respecting a labor union in the public sector would not be required to be "exclusive" recognition.

COLLECTIVE BARGAINING

Since the LMRA does not apply to *public employment*, there is no question as to the fact that a public employer is not *required* to bargain collectively with its employees or their union representatives. The question is, may a public employer bargain collectively with a labor union concerning the terms and conditions of employment of its employees if in its discretion it desires to do so?

At the very start of our consideration of this question, it must be recognized that one problem, perhaps the principal problem, stems from the fact that the term "collective bargaining" is susceptible of varied usages and definitions. In the industrial sense and with reference to the LMRA it is generally used to describe the negotiations leading to the collectively bargained contract between the employer and the labor union. See, e.g., 51 C.J.S. *Labor Relations*, § 148. However, as the Court of Appeals of Arizona pointed out in *Board of Education v. Scottsdale Education Association*, 17 Ariz. App. 504, 498 P.2d 578, 582 (1972), the term has many meanings to many people, ranging in the school context:

> ". . . from a teacher making known to the Board his or her desires concerning placing a blackboard in a classroom, to discussing and conferring with the Board as to a teacher's salary scale, to an agreement setting forth in exacting detail the workings of the school system."

The court concluded that in the sense of meeting and consulting with union officials concerning the working conditions of public employees there was no problem. As the court put it:

> "In our opinion, this power to hire teachers, fix their salaries and to control the operation of the school district, necessarily carries with it the implied power, authority, if the Board so desires, to consult and confer with an additional teacher in order for the Board to make a sapient judgment as to wages and working conditions. In this regard we see little difference between 1200 teachers individually making known their desires to the Board concerning their wages and working conditions, and a representative of those 1200 teachers making known the same desires. 498 P.2d at p. 582.

The court stressed the fact that the decision of whether or not to engage in "collective bargaining" was one which addressed itself to the board, saying:

> "We therefore hold that the Board has authority to enter into 'collective bargaining' with a representative of the teacher-employees when that "collective bargaining' is used in the context of meeting and consulting with. However, the decision of whether the Board desires to enter into such a 'collective bargaining' situation remains for the Board, and actions to compel or coerce the Board to so bargain collectively against its better judgment are improper." 498 P.2d at p. 583.

Approval of "collective bargaining" in this sense is also seen in *State Board of Regents v. United Packing House Workers*, 175 N.W.2d 110 (Iowa 1970), where the Supreme Court of Iowa noted that:

> "A public employer's general power to carry out its assigned functions is sufficiently inclusive to permit consultation with all persons affected by those func-

> tions. . . . This consultation serves the public interest by permitting informed governmental action without abridging governmental freedom of action." 175 S.W.2d at pp. 112-113.

The Iowa Supreme Court thereupon held:

> "The Board of Regents *has the power* and authority to meet with representatives of an employee's union to discuss wages, working conditions and grievances *if it so desires.* It can do so without becoming obligated to meet with the representatives of any other group of employees. The agreed terms could be adopted by the Regents in a proper legislative manner. Such action does not involve an improper delegation of legislative powers to private persons as there is no compulsion to sign an agreement and the final decision remains in the Board of Regents." 175 N.W.2d at p. 113. (Emphasis added.)

The reasoning of these cases seems sound, and while the courts of Georgia do not appear to have passed upon the question, the office of the Attorney General of Georgia has, in an unofficial opinion, reached the same conclusion. In discussing the question of possible collective bargaining with state hospital employees it was concluded in Op. Att'y Gen. 69-262 (unofficial):

> "Inasmuch as I am aware of any State statute which would require [state] hospitals to bargain collectively with hospital employees or their labor organizations, I conclude that no such legal obligation exists. This is not to say, of course, that the hospital employer could not bargain collectively *if it voluntarily chose to do so.*" (Emphasis added.)

It is my opinion that if called upon to pass on the matter the courts of Georgia would probably uphold the right to bargain collectively in the sense of meeting and consulting with union officials about wages, hours and the conditions of employment of public employees.

Although there is some authority to the contrary, see, e.g., *Gary Teachers Union, Local No. 4, American Federation of Teachers v. School City of Gary*, 284 N.E.2d 108 (Ind. App. 1972); *Chicago Div. of Ill. Ed. Ass'n v. Board of Education*, 76 Ill. App.2d 456, 222 N.E.2d 243, 251 (1966),[7] the weight of authority seems to be that in the absence of legislative authority a governmental body may not enter into a binding collective bargaining *contract* with a labor union. See, e.g., *State Board of Regents v. United Packinghouse Food and Allied Worker's*, 175 N.W.2d 110, 117 (Iowa 1970); *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547, 550 (1962); Anno: *Labor Public Employees*, 31 A.L.R.2d 1142, 1170. The most commonly stated reason for this conclusion is that the power to determine wages, hours and other conditions of employment cannot be delegated by the governmental board or agency in which it has been legislatively vested. As stated in *Board of Education v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578, 585-586 (1972):

> ". . . the alternate responsibility of controlling and managing the affairs of the school district rests with the Board and the Board may not by contract, dilute that responsibility or surrender the Board's legal discretion in how the responsibility is to be exercised. We, therefore, hold that the 1971 agreement between the Board and SEA was without the power of the Board to enter into and is therefore void."

In *International Longshoreman's Ass'n, AFL-CIO v. Georgia Ports Authority*, 217 Ga. 712 (1962), cert. denied, 370 U.S. 977 (1972), the Supreme Court of Geor-

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[7] While holding that the governmental employers involved could lawfully enter into binding union contracts, the Illinois and Indiana courts both stressed the fact that the authority was "permissive," and that there was no constitutional or statutory "duty" upon the public employers to enter into the agreements in question.

gia, in addressing itself to a strike situation involving the Georgia Ports Authority, said:

> "We, therefore, hold that the State Ports Authority in the operation of the docks and warehouses at its Savannah terminals *was without authority to enter into an agreement with any third party* fixing the terms and conditions of the employment of personnel working for the authority." 217 Ga. at p. 718.

Whatever question may heretofore have existed with respect to whether this language was in fact a "holding" or whether it was really only "dicta" (the issue before the court was the legality of the strike and picketing and not the authority of the Ports Authority to enter into a collective bargaining contract) is no longer of any consequence. In *Chatham Association of Educators v. Board of Public Education for the City of Savannah and the County of Chatham*, 231 Ga. 806 (1974), the court squarely held that a collective bargaining contract between a school board and a labor union was void, and the rationale of the holding unquestionably rests on the ground that it was an illegal attempt by the school board "to delegate its powers and authority to provide the conditions of employment of its teachers and to determine the manner in which the public funds for the operation of the schools shall be allocated." 231 Ga. at p. 808. Thus, it is now clear that unless and until the General Assembly authorizes them to do so, public employers in Georgia cannot enter into valid collective bargaining *contracts* with labor unions.[8]

STRIKES

Ga. Laws 1962, p. 459 (Ga. Code Ann. § 89-1301), provides that:

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[8] In *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D. N.C. 1969) [three-judge], the court rejected a constitutional attack upon a state statute declaring contracts between governmental units and labor unions to be contrary to public policy and void.

> "No person holding a position by appointment or employment in the Government of the State of Georgia or any agency, authority, board, commission, or public institution thereof shall promote, encourage or participate in any strike."

The courts have quite generally recognized the right of states to prohibit strikes by their employees. See, e.g., *Melton v. City of Atlanta, Georgia*, 324 F. Supp. 315, 319 (N.D. Ga. 1971) [three-judge]; *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1076-77 (W.D. N.C. 1969) [three-judge]; *Norwalk Teachers' Ass'n v. Board of Education*, 138 Conn. 269, 83 A.2d 482, 484-85 (1951); Anno: *Labor—Public Employees*, 31 A.L.R.2d 1142, 1159. Consequently, there would seem to be little doubt as to the validity of Georgia's statute.

It must not be overlooked, of course, that by its terms, Ga. Code Ann. § 89-1301 applies only to state agencies, authorities, boards and institutions. Yet the prohibition seems to be well rooted in public policy. Courts in other jurisdictions have held strikes by public employees (whether state *or local*) to be unlawful under common law even in the absence of statute. See 51A C.J.S. *Labor Relations*, § 306. Although I have not found any reported decision of the Supreme Court or Court of Appeals of Georgia on the point it would be my opinion that if the question arose the Georgia courts would more likely than not hold that the same public policy which has been given statutory recognition with respect to state employees also applies to county or municipal employees even in the absence of statute.

PICKETING

The question of picketing presents unsettled issues. Ga. Code Ann. § 54-803 makes it unlawful for anyone:

> ". . . to engage in mass picketing at or near any place where a labor dispute exists, in such a number or manner as to obstruct or interfere with the en-

trance to or egress from any place of employment. . . ." Ga. Laws 1947, p. 620.

Moreover, the Supreme Court of Georgia, along with the courts of various other jurisdictions, has held that even "peaceful picketing" may be enjoined if it is conducted for "unlawful purposes." See *International Longshoreman's Ass'n, AFL-CIO v. Georgia Ports Authority*, 217 Ga. 712 (1962), cert. denied, 370 U.S. 977 (1962); *Weakly County Municipal Electric System v. Vick*, 309 S.W.2d 792, 804 (Tenn. 1958).

On the other hand, Ga. Laws 1962, pp. 459, 460 (Ga. Code Ann. § 89-1302), expressly provides that the statutes prohibiting strikes by state employees shall *not*:

> ". . . limit or impair the right of any State employee to express or communicate a complaint or opinion on any matter related to the conditions of State employment so long as the same is not designed and does not interfere with the full, faithful, and proper performance of the duties of employment."

The expansion of the federal constitutional protections of "freedom of speech" and "freedom of association" by the Supreme Court of the United States during recent years is, of course, common knowledge. The question of whether or not, and if so, to what extent, this federal constitutional guarantee has extended into the area of "peaceful picketing" is uncertain. Courts in other jurisdictions have held that picketing of an "informal" nature, such as publicizing the fact of a labor dispute, is not unlawful so long as the administration and performance of the public functions or services are not interfered with. See *Klein v. Civil Service Commission of Cedar Rapids*, 260 Iowa 1147, 152 N.W.2d 195, 200 (1967); *City of West Frankfort v. United Ass'n of Journeymen, etc.*, 53 Ill. App.2d 207, 202 N.E.2d 649, 652 (1964). Because of the unsettled issues of law con-

cerning the First Amendment, and because of the obvious involvement of factual circumstances which will vary in each case, it would seem that with respect to "peaceful picketing" of an essentially informational nature by public employees, the questions of legality and illegality will probably have to be resolved on a case-by-case basis—the principal (but not exclusive) guideline being whether the picketing in any way interferes with "the full faithful and proper performance" of the governmental function, service or activity involved. Accord, Ga. Code Ann. § 89-1302.

CLOSED SHOP

Interestingly enough, Georgia's "right to work" legislation (Ga. Laws 1947, p. 616 et seq.; Ga. Code Ann. Ch. 54-9), which provides that no individual can be required to be a member of or to pay dues or any fee to a labor organization as a condition of his employment, and which further provides that any provision in a contract between an employer and a labor organization to the contrary is against public policy and "absolutely void" (see Ga. Code Ann. § 54-904), does not by its terms appear to be applicable to public employees (since the term "employer" expressly excludes "any state or political subdivision thereof"). Ga. Code Ann. § 54-901(a).

Yet I think thas this is primarily of academic interest. If the mere entry into a collective bargaining agreement concerning public employment in general is an unlawful delegation by the public employer of its power and responsibility to determine wages, hours and other conditions of employment (see *International Longshoreman's Ass'n, AFL-CIO v. Georgia Ports Authority*, 217 Ga. 712 (1962), cert. denied, 370 U.S. 977 (1972); *Chatham Association of Educators v. Board of Public Education for the City of Savannah and the County of Chatham*, 231 Ga. 806 (1974)), a delegation of its even more basic power and responsibility to determine whom it shall em-

ploy and whom it shall not employ is surely an even more flagrantly unlawful delegation of the power and responsibility which the legislature has placed upon it. While there seems to be a paucity of legal authority on the matter this appears to be the conclusion reached by those courts which have considered the matter. See, e.g., *Smigel v. Southgate Community School District*, 24 Mich. App. 179, 180 N.W.2d 215 (1970); *Los Angeles v. Los Angeles Bld. & Constr. Trades Council*, 94 Cal. App.2d 36, 210 P.2d 305, 310 (1949); *Petrucci v. Hogan*, 27 N.Y.S.2d 718, 725 (1941).

THE CHECKOFF OF UNION DUES

Article VII, Section I, Paragraph II of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-5402 (1)), provides that with certian enumerated exceptions not here applicable:

> "The General Assembly shall not by vote, resolution, or order grant any donation or gratuity in favor of any person, corporation or association. . . ."

While the language of this constitutional provision by its terms speaks of grants *by the General Assembly*, it has long since been settled that it is equally applicable to subordinate agencies and even political subdivisions of the state. See, e.g., *Grand Lodge of Georgia, Independent Order of Odd Fellows v. City*, 226 Ga. 4, 8 (1970); *Atlanta Chamber of Commerce v. McRae*, 174 Ga. 590 (1932). Ops. Att'y Gen. 73-116, 73-120.

I do not think it can be questioned but that deducting dues, contributions, donations or other payments from the pay check of a public employee and then transmitting the sums withheld to some third party would impose a significant bookkeeping and administrative burden upon the state department or agency concerned. Nor do I think that it can seriously be questioned but that the third party recipient of the sums withheld (be it labor union

or any other association or organization) would receive a very valuable service as a concomitance of the state's assumption of this burden. When the third party recipient is not in an contractual relationship with the state, it would seem to follow that what it receives (i.e, the state's bookkeeping and administrative support and services) is a "donation or gratuity" within the meaning of Article VII, Section I, Paragraph II of the State Constitution. That the objective of the dues checkoff or other deduction for a third party may be for a worthy or even charitable cause would not appear to be of any consequence. As the Supreme Court of Georgia put it in *Wright v. Absalom*, 224 Ga. 6, 8 (1968):

> "The object of an expenditure may be a very worthy cause and highly beneficial to the general public, but this will not suffice where the constitutional authorization for such expenditure is lacking."

In light of the foregoing it is my opinion that in the absence at the very least of some clear legislative authorization, it would not be lawful for a state department, board or agency to deduct dues, contributions, donations or other payments from a public employee's pay check for transmittal to some third party (whether a labor organization or otherwise) with which the state has no contractual relationship. With specific reference to a checkoff of union dues I believe this conclusion is further supported by the fact that bills which would have authorized the checkoff of union dues of public employees have been introduced into the General Assembly and that such bills have not passed. See H.B. 359 (1951); H.B. 1344 (1972). Nor would it seem amiss to point out that as a matter of policy the state has ordinarily declined to assume this sort of a burden for the benefit of a third party (i.e., bookkeeping and administrative services) even where incidental to the judicial process of garnishment. Cf. Ga. Laws 1945, pp. 438, 440 (Ga. Code Ann. § 46-805); *Troup County Board of Commissioners v. Public Finance Corp.*, 109 Ga. App. 547 (1964).

CONCLUSION

As we have seen, the current legal status of public employee labor unions in Georgia involves some certainties and perhaps an even greater number of uncertainties. The situation with respect to those legal issues which we have discussed might best be summarized as follows:

1. Organization and Membership—This would appear to be one of the certainties. The right of a citizen to organize or to join a labor union is protected by the First Amendment to the United States Constitution (Ga. Code Ann. § 1-801) and it is well settled that a state cannot require an individual to waive or forego this federally protected right as a condition of public employment.

2. Union "Recognition"—This is one of the uncertainties. While the term has a rather precise meaning and triggers various legal obligations in the general industrial context of the Labor Management Relations Act, it has, so far as we are able to ascertain, no fixed meaning outside of the purview of that Act (as, for example, with respect to public employment).

3. Collective Bargaining—This is another uncertainty since the answer depends on how the term is defined. If the term is used solely in the limited sense of meeting with and talking to union officials to obtain their views or recommendations on the wages, hours or other employment conditions of public employees, it is unquestionably within the *discretionary* power of the affected state agency to do so *if it wants to.*

4. Collective Bargaining Contract—The Supreme Court of Georgia has spoken (see *Chatham Association of Educators v. Board of Public Education for the City of Savannah and the County of Chatham*, 231 Ga. 806 (1974)), and there would appear to be no question as to the fact that public employers in Georgia cannot enter into valid collective bargaining contracts with labor unions.

5. Strikes—Strikes by the employees of state departments and agencies are prohibited by statute in Georgia.

6. Picketing—The question of peaceful picketing by public employees raises unsettled legal issues which will probably have to be resolved on a case-by-case basis. It is possible that peaceful picketing which is purely informative and does not interfere in any way with the performance of the public function in question may be protected by the First Amendment.

7. Closed Shop—Although Georgia's "right to work" legislation does not by its express term apply to public employees, there would seem to be little doubt but that any attempt to provide for a closed shop arrangement with respect to public employees would be stricken by the courts as contrary to public policy.

8. Union Dues Checkoff—In the absence of clear legislative authorization it would not appear to be lawful for a state department, board or agency to deduct union dues from an employee's pay check.

(3)

No. 90-120

In The

Supreme Court of the United States

October Term, 1989

ALFREDA DILLARD, et al.,

Petitioners,

v.

JOE FRANK HARRIS, GOVERNOR
STATE OF GEORGIA AND
GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, under 29 U.S.C. § 207(o), a state whose laws, policies and practices prohibit it from negotiating and reaching agreements with third party representatives concerning its employees' terms and conditions of employment, is prohibited from using compensatory time off in lieu of monetary payments for overtime hours worked where said employees have designated a third party representative to negotiate overtime pay on their behalf?

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STATEMENT OF THE CASE

Petitioners are employees of the Georgia Department of Human Resources, and were all hired prior to April 15, 1986. The Petitioners allege that the Defendants, Joe Frank Harris, the Governor of the State of Georgia, and the Georgia Department of Human Resources ("State Defendants"), violated 29 U.S.C. § 207(o) by awarding compensatory time off ("comp time") in lieu of cash payments for overtime hours worked without first reaching an agreement with the Petitioners' representative, the Georgia State Employees' Association Union (the "Union"). The Respondents, on the other hand, submit that because their laws, practices, and policies prohibit them from negotiating the terms and conditions of state employment with third party representatives, subclause (A)(ii), rather than subclause (A)(i), of § 207(o)(2) is the governing provision with regards to overtime pay. The Respondents, therefore, did not violate the FLSA by paying their employees comp time in accordance with their regular practice in effect on April 15, 1986.

The question in this case involves the appropriate interpretation of § 207(o)(2)(A) of the Fair Labor Standards Act (hereinafter referred to as "FLSA" or "the Act", codified at 29 U.S.C. § 201, *et seq.*) with regards to those states, such as Georgia, whose laws, policies and practices prohibit them from negotiating and reaching agreements with third party representatives concerning public employees' terms and conditions of employment.

Generally, the FLSA requires employers, including state and local governments, to pay employees for overtime hours worked. In 1985, Congress amended the FLSA

to allow states and local governments the opportunity to pay for such overtime hours worked in the form of compensatory time off instead of monetary payments. It states in part that:

> (2) A public agency may provide compensatory time under paragraph 1 only –
>
> (A) pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work;
>
> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with the subsection.

29 U.S.C. § 207(o).

The State of Georgia is prohibited from negotiating and reaching agreements with third party representatives. *International Longshoremen's Ass'n v. Georgia Ports authority*, 217 Ga. 712, 124 S.E.2d 733, *cert. denied*, 370 U.S. 922 (1962); *Chatham Ass'n of Educators v. Board of Public Education*, 231 Ga. 806, 204 S.E.2d 138 (1974). Because of

this prohibition, the State of Georgia relied on subclause (A)(ii) of § 207(o)(2) and continued to use its regular practice of awarding compensatory time off for overtime hours worked and monetary payments for said overtime hours, providing there is adequate funding for such payments. It is this policy that the Petitioners contend violates the FLSA.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court should deny the Petition for Writ of Certiorari in this case because the decisions of three of the four courts of appeals that have addressed the issue presented for review are not in conflict and represent a clear and concise interpretation of the statutory provision in question. The circuit which reached a different result, the Tenth Circuit Court of Appeals, applied a similar analysis and discussion of the pertinent matters, but failed to consider the comments of the Secretary of the United States Department of Labor when it reached its decision. These comments should have been considered because the Tenth Circuit's decision turned on the regulations promulgated by DOL, and the court should have looked at the regulatory history in order to determine the Secretary of Labor's intent with regards to state law. By failing to do so, the Tenth Circuit's analysis was simply incomplete, and does not justify the need for this Court to review the decision of the Eleventh Circuit.

The identical issue presented for review in this Petition has already been presented to this Court during its current term in the Fourth Circuit's decision in *Abbott v.*

City of Virginia Beach, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990). The Petition was denied.

ARGUMENT

I. THE DECISION OF THE COURTS OF APPEALS FOR THE FOURTH, EIGHTH, AND ELEVENTH CIRCUITS ARE NOT IN CONFLICT, AND REPRESENT A CLEAR AND CONCISE INTERPRETATION OF THE STATUTE IN QUESTION.

The Petitioners correctly point out that since § 207(o) of the FLSA became law, four Courts of Appeals have had the occasion to address the issue presented for review. *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990); *Local 2203 v. West Adams County Fire Dist.*, 877 F.2d 814 (10th Cir. 1989); *Nevada Hwy. Patrol Ass'n v. Nevada*, 899 F.2d 1549 (9th Cir. 1990); and *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989). Petitioners' brief at p. 7. They incorrectly state, however, that each of these Courts gave this provision a different reading which resulted in at least four different legal tests. Petitioners' brief at p. 7. To the contrary, a review of the decisions of the Courts of Appeals for the Fourth, Ninth, and Eleventh Circuits reveals that these courts applied the same reasoning and logic, and similarly concluded that state law governs the determination of whether subclause (A)(i) or (A)(ii) applies for purposes of overtime pay for public employees under § 207(o) of the Act. In reaching their decisions, all four Courts of Appeals reviewed the legislative history in order to determine congressional intent as to the meaning of the term "representatives" as used in § 207(o). In addition, all four

Courts reviewed, and accorded respect to, the regulations promulgated by the United States Department of Labor.

After reviewing the legislative history of the House and the Senate in determining what Congress meant by the word "representative" as used in subclause (A)(i) of § 207(o)(2)(A) of the Act, the courts found that there was a conflict as to its intended meaning. The House Report provides:

> Where employees have selected a representative, *which need not be a formal or recognized collective bargaining agent* as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employee. . . .

H.R. Rep. No. 331, 99th Cong. 1st Sess. 20 (1985) (emphasis added).

On the other hand, the Senate Report provides:

> Where employees do not have a *recognized representative*, the agreement or understanding must be between the employer and the individual employee.

S.R. Rep. No. 159, 99th Cong. 1st Sess. 10, 1985 U.S. Cong. and Admin. News 651, 658 (emphasis added). With this conflict in the legislative history of the House and Senate concerning the meaning of "representative", the courts looked to the regulations promulgated by DOL for guidance, specifically, 29 C.F.R. Part 553 (1988). These regulations provide in pertinent part:

> In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees.

29 C.F.R. § 553.23(b)(1). It is this provision that caused the Tenth Circuit to conclude that it matters not what state law provides with regards to third party representatives; rather, the deciding factor is that the employee designated a representative for such purpose. *Local 2203*, 877 F.2d at 820. It is at this stage, however, that the Tenth Circuit deviated from the logic and reasoning of the other circuits when it failed to look at the regulatory history of the Department of Labor regulations in order to determine the context in which those regulations were intended to be applied.

During the process of promulgating § 553.23 of the regulations, the Secretary of Labor received comments from several representatives of state and local governments who expressed concern with the statement in § 553.23(b)(1) that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." They expressed concern that such language would conflict with state laws which do not require or which prohibit recognition of collective bargaining agents. *See* 52 Fed. Reg. 2014 (1987). In response to these comments, the Secretary of Labor stated that:

> The Department recognizes that there is a wide variety of state law that may be pertinent in this area. *It is the Department's intention that a question of whether employees have a representative for purposes of FLSA § 207(o) shall be determined in accordance with state or local law and practices.*

52 Fed. Reg. at 2014-15 (emphasis added). This language clearly indicates that when DOL promulgated 29 C.F.R. § 553.23, it had no intention of ignoring or preempting

state law concerning "representatives." That is, if there can be no third party representative under state law, then subclause (A)(ii), not (A)(i), of § 207(o)(2)(A) of the Act applies. This was the conclusion reached by the Fourth, Ninth, and Eleventh Circuits.

Additionally, the Eleventh Circuit, in reaching its decision, applied the rule of statutory construction handed down by this Court; to wit, if the legislative history of the House and Senate are in conflict, the history of the body in which the enacted bill originated is normally more persuasive. *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956). It is undisputed that the bill which was eventually enacted as § 207(o)(2)(A) originated in the Senate. Accordingly, the legislative history of the Senate is more persuasive. The Senate's legislative history clearly states that in order for subclause (A)(i) to apply, the representative designated by the employee must be a "recognized" representative. 1985 U.S. Code Cong. and Admin. News at 657-59. Therefore, since Georgia law prohibits public employees from recognizing third party representatives, the Act allows them to rely on subclause (A)(ii) to use compensatory time for payment of overtime hours worked.

CONCLUSION

Based on the foregoing, it is without doubt that the decisions of the Fourth, Ninth and Eleventh Circuits are in accord with each other and with the intent of the Secretary of the Department of Labor. These decisions represent clear, concise and complete interpretations of

§ 207(o)(2)(A), while the analysis of the Tenth Circuit is incomplete. Accordingly, this Court should uphold the decisions of the Fourth, Ninth and Eleventh Circuits by denying this Petition for Writ of Certiorari, as it has already done in the case of *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, ___ U.S. ___ (1990).

Respectfully submitted,

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